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IDENTIFIERS *Colorado

ABSTRACT

This document contains all Impartial Hearing Officer Decisions, State Level Review Decisions, and Complaint Findings issued in Colorado in 1993 and is intended as a resource tool for assuring the provision of a free appropriate public education to children with disabilities. The full text of each decision or finding is preceded by a case summary which includes a listing of key topics, a statement of the issues, the decision and highlights of the decision, and highlights of the discussion. The documents are divided into due process and complaint documents. An index is provided which lists the decisions and findings by key topics. Key topics include: procedural safeguards, due process hearings, extended school year, discipline (suspension and expulsion), free appropriate public education, residential placement, private schools, least restrictive environment, student evaluation, confidentiality of information, related services, individual educational plan, attorney fees, surrogate parents/guardian ad litem program, HIV (human immunodeficiency virus) and other health related issues, qualified instructional personnel, infants and toddlers and other preschool handicapped, graduation and exit, transitional programming, and compensatory services. (JDD)

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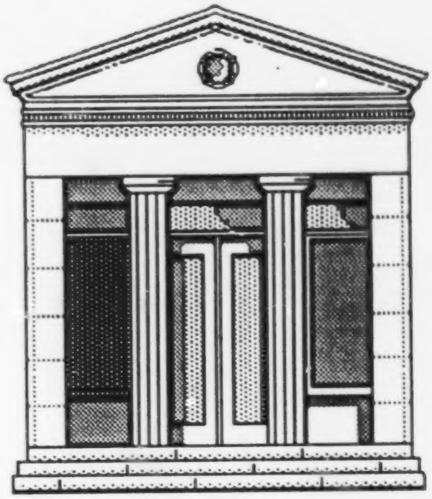
COLORADO
SPECIAL EDUCATION
ADMINISTRATIVE DECISIONS



Impartial Hearing Officer Decisions

State Level Review Decisions

Federal Complaint Findings

EC 303279

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COLORADO DEPARTMENT OF EDUCATION
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MEMORANDUM

TO: All Interested Persons

FROM: Colorado Department of Education
Special Education Services Unit

DATE: April 22, 1994

SUBJECT: Supplement to Special Education Administrative Decisions

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Enclosed, please find documents which supplement your Special Education Administrative Decisions.

An updated index is also enclosed. These pages should replace the current index contained at the front of the Special Education Administrative Decisions 1988-89 or later volume.

Please direct any questions you may have regarding the supplements or the original volumes to Kathi King at (303) 866-6819.

COLORADO
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ADMINISTRATIVE DECISIONS
1993

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Introduction

Colorado Special Education Administrative Decisions contains all Impartial Hearing Officer Decisions, State Level Review Decisions, and Complaint Findings issued in 1993. The document is a resource tool for special education directors, impartial hearing officers, advocates, attorneys and others involved in assuring the provision of a free appropriate public education to children with disabilities in Colorado. Materials will be updated on a periodic basis by the Special Education Services Unit of the Colorado Department of Education.

The full text of each decision or finding is preceded by a case summary which includes a listing of key topics, a statement of the issues, the decision and highlights of the decision and highlights of the discussion. Additionally, an index is provided which lists the decisions and findings by key topics.

The documents are divided into due process and complaint documents. Within each section the documents are in numerical order based on the date a request for a due process hearing is made or a complaint is filed. Impartial Hearing Officer Decisions, State Level Review Decisions and any supplementary decisions on the same case are filed together. Impartial Hearing Officer decision numbers are designated with an "L", followed by the year of request and a number beginning with "100" that designates the chronological order in which the request was received by the Colorado Department of Education within a particular year, for example "L93:101". A State Level Review Decision in the case would contain the same number except be preceded by an "S", for example "S93:101." Complaint findings are listed by the year and a number beginning with "501" that designates the chronological order in which the complaint was filed with the Colorado Department of Education within a particular year, for example "93: 501".

It is intended that the materials contained in these volumes be used for information and guidance by those involved in the provision and administration of special education programs. The materials do not necessarily reflect the current administrative positions of the Colorado Department of Education.

March 17, 1994

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Case Number: L93:105

Status:	Impartial Hearing Officer Decision
Key Topics:	IEP Procedural Safeguards (Parental Consent and Evaluations) Student Evaluation (Records)

Issues:

- Whether the District failed to maintain and provide the parent access to the student's records.
- Whether the District improperly denied access to the student's classroom or teachers.
- Whether the District failed to provide appropriate classes and teachers.
- Whether the District complied with State and Federal regulations by completing the staffing and IEP within the required 45 days.
- Whether the IEP meets regulatory requirements.
- Whether racial discrimination existed at the District which denied FAPE to the student.

Decision:

- The hearing officer found that no evidence existed which proved any of the petitioner's claims.

FINDINGS AND DECISION

JUN 14 1993

CASE NO. 93:

Impartial Hearing Officer: Raymond Lee Payne, Jr.

INTRODUCTORY STATEMENT
AND
PRELIMINARY RULINGS

This matter was heard on May 13, June 2 and 3, 1993 in the school district's Educational Service Center, 4700 So. Yosemite St., Englewood, Colorado. Jurisdiction is conferred by P.L. 94-142 and the 1992-1994 State Plan as submitted by the Colorado Department of Education under Part B of the Individuals With Disabilities Education Act and as Amended by P.L. 94-142 (20 U.S.C. Sec. 1401 et. seq.). Petitioner appeared through her mother pro se, and was assisted by Mrs. Sharon Harris, a children's advocate and consultant to the State Department of Education. Mrs. Harris appeared as a volunteer and not in any official role for the State. Because of prior commitments Mrs. Harris did not attend hearings on May 12 or 13, 1993. Dr. Richard Reed, Director of Special Education for the Cherry Creek School District appeared for the Respondent with their attorney, Mr. Darryl Farrington of the firm of Banta, Hoyt, Greene and Everall, P.C., 6300 So. Syracuse Way #555, Englewood, Colorado 80111.

A Pre-Hearing was held May 12, 1993. The Hearing itself commenced May 13, 1993. Before commencing the hearing Petitioner moved for a two week continuance, advising she felt inadequate to try the case without an attorney. She stated she had contacted an attorney, one William Baesman and requested that I telephone him as he was unable to be present. Mr. Baesman advised myself and Respondents counsel that he did not then represent the Petitioner and would first need two weeks to investigate, review the case and documentation before he would be able to advise Petitioner. He would then determine whether to accept the representation of Petitioner.

Respondents Counsel objected to the continuance with three weeks remaining in the present school year and alleged that the student was not attending certain classes. Such delay he asserted would not be in students best interest. This IHO denied the motion, finding insufficient cause to continue, there being merely a possibility Mr. Baesman would represent the Petitioner, because the 45 day time limitation for completing this matter was almost at an end and recognizing that a swift resolution in order to serve the interests of the child was of more paramount concern.

Opening statements were reserved in order to take the testimony of one witness who was unable to be available on May 17, 1993, the day scheduled for hearing this matter.

On May 17, 1993 Mrs. Sharon Harris, the children's advocate assisting the mother in presenting her case, appeared and advised Respondent and this IHO that Petitioner was at the hospital emergency room with a child who was suddenly ill and that she would not be able to attend. Mrs. Harris moved for a Continuance on this ground. Respondents counsel raised no objection. Mrs. Harris was advised that she was on behalf of the Petitioner waiving the 45 day rule by requesting the continuance. The matter was reset for June 2 and 3, 1993, good cause having been shown.

Petitioner and Respondent selected these dates to allow further time to seek a resolution through obtaining an independent evaluation and meeting for a review staffing prior to this hearing continuing. An agreement was not reached. This IHO then ruled that any testimony regarding that process, since in the nature of a compromise and settlement, would not be heard or considered for purposes of this Complaint.

Prior to taking opening statements the IHO asked the parties to make specific objections to the opposing parties exhibits and proposed to admit all others not objected to without the necessity of laying a foundation for their admission. Petitioner objected generally to the receipt of any exhibits by the Respondent. This IHO then ruled that, although it would add extra time to introduce the exhibits individually, such was the right of Petitioner and no exhibits would be admitted without first laying a proper foundation.

FINDINGS OF FACT

1. The student was enrolled in this school district in April 1992.

2. Her prior school history, within various Colorado schools, included receiving special services when retained in 3rd grade and home-bound teaching after foot surgery in 8th grade.

3. Her mother testified that her child attended regular classes in those schools attended prior to enrolling in this school district, studied hard, had supportive teachers, had a good attendance record, and had made the honor roll. The student planned to attend law school.

4. The students early grades from this school district, showed the student was performing poorly. Contacts between mother and school district personnel became increasingly frequent.

5. It is not clear when, but shortly thereafter the mother requested of the district an educational evaluation of her daughter.

6 The student was given some testing in mid-August of 1992.

7. The mother did not sign a written consent and acknowledgment of having been given notice of parental rights until August 24, 1992,

after the school had done the testing. The consent given withheld permission for the school to do psychological testing, and stated she wished to choose any psychological evaluator herself. The date is not clear on the exhibit (exhibit C), but she seems to at the same time have sent the special education director a note expressing her displeasure with what she perceived as delay in admitting the student into special education classes, the failure to yet staff the student and advising she was requesting no further testing.

8. The school psychologist continued to negotiate for additional testing and by letter of September 25, 1993 advised the mother of the specific testing instruments they wished to use and have her consent to. The schools standard, pre-printed consent form was again enclosed along with a family history questionnaire which the mother was requested to fill out. The mother filled out and returned the family questionnaire and the consent form, restricting testing to the IQ test for children, the CITE Learning Style Inventory and a test for Visual Motor Development. Both forms were signed by her and dated September 28, 1992.

9. Following testing, a staffing, lasting more than 3 hours, was held on November 12, 1992.

10. At the staffing an IEP, bearing the November 12, 1992 date was written and approved by the Mother and those attending. The student was found to to qualify for special education with a disabilities determined to be a perceptual problem which does not allow her to process auditory information or retain information within her memory for any long period of time. There were also indications of hearing and sight loss which were not viewed as being as serious for her to achieve academically. Tests indicated that her learning method is by visual means.

11. Changes in the students classes were made. The student failed to demonstrate any progress in her classes.

12. The mother communicated her increasing dissatisfaction, complaining and demanding action of various school personnel through numerous telephone calls, personal visits and letters.

13. The school responded by requiring the mother to channel all her communications with the school through one school official.

14. On April 5, 1993 the mother filed her request for an impartial due process hearing.

15. The school's records of the student's class attendance include absences of 17 days prior to this hearing commencing and 10 additional days thereafter. Some of these absences were excused and some were not. It also appears that one of the excused absence notes was not written by the mother

16. Teachers report the student is pleasant, cooperative and works

well when attending classes. She has not made up assignments missed when absent. Teachers state that they will fail her in those classes unless work is made up.

ISSUES RAISED FOR DETERMINATION

1. Has the Respondent failed to maintain and provide this parent access to her child's records?

The 1992-1993 State Plan, Part II B. VIII B. 3. a. (1) permits parents to inspect and review any educational records relating to the student which are in the school's possession. See also 34 CFR Ch III (11-1-89 Edition) Sec. 300.562 and 20 U.S.C. 1412 (2) (b); 1417 (c).

Review of the testimony reveals nothing which remotely indicates the district was requested to, or failed to make their records available to the parent. In fact, Petitioner made no complaint of being denied any requested student records even at the pre-hearing.

2. Was the Petitioner/mother improperly denied access to the students classroom or her teachers?

Part II B. V. E. 2. of the State Plan requires that staffing and development of the IEP include the parent and in Part II B. VI B. further details how the school district shall notify, inform and educate the parent regarding that information collected by them, in order that the parent may knowledgeably assist in determining how the district will provide their handicapped child a free appropriate public education (FAPE).

This IHO is satisfied that for purposes of the staffing and IEP process, the preponderence of the evidence reveals compliance with due process hearing requirements. The parent was involved with teachers and relevant school personnel in the staffing process, which in this case ought to have been thoroughly covered in the three plus hour session, and consented to the placement by signing the IEP.

Subsequent limitations placed on the mother by requiring her to channel all calls through one school official first do not affect the validity of the IEP. Respondents counsel has referred this IHO to a 1986 Washington State ruling (Case 86-14: 1985-86 EHLR DEC 507:488) which held that a parent cannot insist on classroom access for the purpose of monitoring a child's progress. It is noted that in said case a restricted monitoring schedule was then nevertheless made a part of the IEP. In the present case it was not shown that access has yet been unreasonably denied.

3. Petitioner alleges that the students records contain errors. The inaccuracies involved the school changing an absence date from a weekend to a school day. The other involved an excuse which the mother denies having written. This IHO finds such errors, if in

fact they do exist, are too minor to rise to the level of being a due process violation.

The State Plan, Part II B. VII 4 provides a method of correction upon parental request without the necessity of convening a due process hearing.

4. Did the Respondent fail to provide the student with appropriate classes and teachers?

Upon review of the evidence this IHO finds the only testimony regarding these issues to be the general allegations of the mother in which she charges that the delay in staffing her child and in failing to provide teachers able to help her daughter were the cause of the students academic failure. Without proven specific examples, this IHO finds that Petitioner has failed to show, by a preponderence of the evidence, proof which would sustain her charge.

5. Did the Respondent comply with State and Federal regulations by completing the staffing and IEP within the required 45 days?

The only time limitation found was 34 CFR Ch. III (11-1-89 Edition) Sec. 300.512 requiring the due process hearing to be completed within 45 days, unless duly waived. He was unable to find a comparable rule for IEP plans.

Assuming nevertheless that such a rule does exist, this IHO finds that the Respondent did not accept the qualified consent form which the mother gave in August. The testimony was that Respondents found the limitations would not allow them to comply with the testing requirements required of them by law before staffing the student. The subsequently negotiated, though still limiting consent signed by the mother on September 28, 1992, when accepted by the school district, would then have commenced the 45 days to run. The date on which the IEP is shown to have been signed and completed was within the rule.

6. Does the IEP fail to meet the regulatory requirements?

Petitioner claims the instrument fails to provide measurable goal or objectives for the student, fails to define her current abilities and functioning levels or to determine her educational and instructional needs.

34 CFR Ch III (11-1-89 Edition) Sec 300.130 requires the State develop the Plan. This IHO has reviewed Part II B. V. E. and finds the IEP requirements contained therein to have been met. He further finds the Petitioner failed to produce, by a preponderence of the evidence, proof sustaining her charge.

7. Petitioner charges the school with racial discrimination which denies her child a FAPE.

This IHO has referred in his findings of fact to incidents which indicate a state of real animosity exists between the mother and a number of school district personnel. There was no competent testimony submitted relative to the charged racial discrimination. At one of the pre-trial conferences reference was made to a racial slur which occurred at an earlier time. Evidence concerning the same and an alleged apology were not submitted or offered in evidence. For purposes of this hearing I find the allegation was not substantiated.

CONCLUSION

The Petitioner has failed to prove, by a preponderence of the evidence, any of her claims. Petitioner's claims are therefore denied.

This decision and findings of fact will go to the parent, the superintendent of the Cherry Creek School District, and the Colorado Department of Education.

Either party may request a state level review by contacting the State Department of education if dissatisfied with the decision and findings rendered by this Impartial Hearing Officer. An Administrative law judge shall be appointed to hear the appeal. Any party wishing to appeal the Impartial Hearing Officer's order, has the same rights as they had at the hearing. Either party may appeal to the court of appropriate jurisdiction if unsatisfied with the final order.

Signed this 11th day of June, 1993.

Raymond Lee Payne Jr.

Raymond Lee Payne, Jr.
Impartial Hearing Officer

Case Number: S93:105

Status: State Level Review

Key Topics: Procedural Safeguards

Issues:

- Whether the matter can be remanded to another Impartial Hearing Officer to make a decision.

Decision:

- The appeal was dismissed because the Administrative Law Judge found no justification to remand the matter to an IHO for a new hearing resulting in a new decision.

BEFORE THE STATE BOARD OF EDUCATION
STATE OF COLORADO

CASE NO. ED 93-085

ORDER DISMISSING APPEAL

[redacted] [redacted], by her parent and guardian [redacted] [redacted],

Appellant,

v.

CHERRY CREEK SCHOOL DISTRICT, ARAPAHOE NO. 4.

Appellee.

On October 4, 1993, a hearing to take additional testimony in this matter was held. [redacted] [redacted], on behalf of her daughter [redacted] ("Appellant") appeared *pro se*[1] and Cherry Creek School District, Arapahoe No. 5 ("the District") was represented by Darryl Farrington, Esq. At that time, as more fully set forth below, Appellant was not prepared to proceed with the hearing, but instead, requested that the Administrative Law Judge remand the matter to an impartial hearing officer ("IHO") to conduct a new local level hearing and counsel for the District moved for an order dismissing the appeal for the Appellant's failure to comply with the Administrative Law Judge's Procedural Order of September 13, 1993, regarding the disclosure of witnesses prior to hearing. The Administrative Law Judge heard the arguments of the parties on these matters and took them under advisement. Having considered the positions of the parties, the Administrative Law Judge denies the Appellant's request and grants the District's motion for the reasons set forth below.

BACKGROUND

On August 6, 1993, the Administrative Law Judge issued a Procedural Order establishing a briefing schedule. Under this order, each party was to submit a list of the issues to be considered on appeal, a designation of the portions of the tape-recorded hearing which were relevant to the issues, written legal argument, and a request for the taking of additional evidence, if any, stating the specific issues requiring the taking of such evidence. On August 18, 1993, the Administrative Law Judge received a letter from the Appellant which, although not it did not comply with the Procedural Order in some aspects, did list the portions of the tape which the Appellant considered relevant to the appeal and indicated that some of these tape recordings were blank.

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In the body of this letter, Appellant asked that she "receive a fair and equal opportunity for access to recordings and entire transcripts for proper appeal." (emphasis in original) No request for the taking of additional testimony was made. The District filed a brief which indicated that it did not feel any additional testimony was needed to determine the issues on appeal, even given gaps in the tape recordings, but that if additional testimony were given, testimony by an expert regarding the individual education plan ("IEP") would be helpful.

On August 27, 1993, the Administrative Law Judge issued a Procedural Order after reviewing all of the original tape recordings received from the custody of the IHO, Raymond Lee Payne, Jr. In the order, the Administrative Law Judge recognized that it could be inferred from the Appellant's August 18, 1993 letter that she might want additional testimony because of the blank portions of the tape but the particular testimony needed could not be determined "without a designation of the parties as to the missing witnesses and the relevance of their testimony to this appeal." The Administrative Law Judge ruled that on or before September 3, 1993 the parties must designate the witnesses, if any, each intended to call at a hearing for the taking of additional evidence and indicated that the parties would be given an opportunity to present testimony and oral arguments. On September 3, 1993, the Division of Administrative Hearings received a letter from the Appellant requesting a new hearing because of the blank spaces on the tapes and the lack of an exact record of that lower level hearing. In that letter, she requested a copy of the witness list.

On September 13, 1993, the Administrative Law Judge ruled on the Appellant's request for a new hearing, which Procedural Order is incorporated herein by reference. The Administrative Law Judge granted the request in part, ruling that additional testimony would be taken on five of the seven issues raised in the local level proceeding, which the Administrative Law Judge ruled were relevant to the appeal, taking the broadest possible reading of the Appellant's appeal letter. An evidentiary hearing was scheduled for October 4, 1993.[2] The parties were ordered to mail to the Administrative Law Judge and exchange witness lists by September 27, 1993 and, further, were advised of their hearing rights. A copy of the witness list from the hearing before the IHO was attached as requested by the Appellant.

On September 27, 1993, the District complied with the order of the Administrative Law Judge and filed its witness list. On October 1, 1993, the Administrative Law Judge received a letter from the Appellant objecting to the process and objecting to the witnesses listed by the District on the basis that those individuals were the ones she had charged with misconduct. Appellant listed no witnesses, she restated the remedies she was seeking from the District and again requested a new hearing.[3]

At the commencement of the hearing on October 4, 1993, the Administrative Law Judge asked the Appellant if she intended to call any witnesses at the hearing; the Appellant stated she did not intend to do so. The Administrative Law Judge reviewed the procedures provided under the due process provisions of the 1992-94 State Plan, Part II, Section VII, including the right to appeal an adverse decision on the state level by the Administrative Law Judge to a state or federal court, rather than to an Administrative Law Judge. The Appellant was reminded that the Administrative Law Judge had ruled that the "new hearing" that was available to the Appellant was on the state level and was set for October 4, 1993. The Appellant was informed that this additional hearing provided her the opportunity to present testimony, to cross-examine witnesses and to argue her case. After a lengthy attempt to clarify the Appellant's position, it was determined that she would only be satisfied by a ruling which remanded the matter to a different IHO, who would hold a *de novo* hearing. A different IHO was required, in the Appellant's opinion, because Mr. Payne had engaged in a conspiracy with the District to deny her a record by deliberately causing portions of the tape-recording of the lower level proceeding to be blank.[4] The Appellant further expressed the opinion that the witnesses listed by the District would change their testimony if they were called to testify in a new hearing[5] and that she did not know what other witnesses she would wish to call at any new hearing.

The District then moved to dismiss the appeal on the basis that the Administrative Law Judge had granted the Appellant the opportunity for a new hearing to take place on October 4, 1993, that Appellant had failed to comply with the Procedural Order giving the parties until September 27 to list their witnesses and she was not prepared to proceed with the scheduled hearing. Counsel argued that there was insufficient basis to order a new hearing before a different IHO and that Appellant's concerns about the District witnesses' testimony would be the same whether the hearing was on a local or state level.

DISCUSSION

The Individuals With Disabilities Education Act, 20 U.S.C. Sections 1400 through 1485 (IDEA) sets forth procedural safeguards which States are mandated to provide to parents such as the Appellant. Parents are given the opportunity to present complaints and "an opportunity for an impartial due process hearing which shall be conducted by the state educational agency or by the local educational agency or intermediate educational unit, as determined by state law . . ." Section 1415(b)(1)(E), (2). If the hearing is at the local or intermediate level, an aggrieved party may appeal the findings and decision to the State agency "which shall conduct an impartial review of such hearing. The officer conducting such review shall make an independent decision upon completion of such review." Section 1415(c). Parties are given the same due process rights at the lower level and the state review level, including the right to counsel, to present evidence and cross-examine witnesses, a record of the hearing and a written decision. A party may appeal a state level review decision by a civil action in state court or federal district court. In a judicial review, the court reviews the record of the administrative proceedings, hears additional evidence at the request of a party and grants appropriate relief based on a preponderance of the evidence.

The federal rules promulgated under IDEA and the Colorado 1992-94 state plan adopted thereunder set forth the hearing rights of the parties. These rights are the same for hearings before an IHO and an Administrative Law Judge doing a state level review. 34 CFR Section 300.508; 1992-94 Colorado State Plan, Part II, Section VII. In conducting a state level review, the Administrative Law Judge has the authority to take testimony as needed to come to an independent decision on the issues raised in the appeal.

Throughout the Federal and State law, significant time deadlines are imposed which express a clear intent that these complaints be resolved in an expedited manner in the best interest of the student. *T.D. v. Westmoreland School Dist.*, 783 F.Supp 1532 (D.N.H. 1992). The Administrative Law Judge considered these constraints before ruling that additional testimony would be taken on all of the issues tried before the IHO which could reasonably be determined to be the subject of the appeal. The effect of this ruling was to provide an opportunity to supplement the record of the IHO in order to provide for a fair state level review. The Appellant consulted with an attorney and determined not to avail herself of this opportunity but, instead, to insist on a full new hearing before a different IHO. The Appellant has not given any legal basis for demanding a new local level hearing other than an argument that she has the right to a record of the IHO hearing, nor has she given any convincing reason why her rights would abridged in any way under the Administrative Law Judge's ruling that testimony be taken on October 4.

Nothing in the Colorado State Plan or in the Federal law or regulations provides for the remanding of a case from the state review level to the local level for the taking of additional evidence. Rather, the requirement that the Administrative Law Judge make an independent decision and the opportunity for additional evidence support an interpretation that any additional hearings are to be conducted at the state level with the same rights accorded to parents as were given in the initial due process hearing before the IHO. *Muth v. Smith*, 646 F.Sup 280 (E.D.Pa. 1986) *aff'd*, 839 F.2d 113 (C.A. Pa.) *rev'd on other grounds*, 109 S. Ct. 2397 (1989). The taking of additional testimony at the state level has been held to include taking of testimony to fill in "gaps in the administrative transcript owing to mechanical failure." *Burlington v. Department of Educ.*, 736 F.2d 773 (1984) *aff'd*, 105 S. Ct. 1996 (1984). Thus, the Administrative Law Judge sees no justification to remand the matter to an IHO for a new hearing resulting in a new decision and, ultimately, a likely new appeal for a state level review. Nor is there any support, even were the Administrative Law Judge to order a remand, to have a new hearing held before a different IHO. For the reasons set forth, the Administrative Law Judge cannot give the Appellant the relief she seeks.[6]

The Appellant disagreed with the Administrative Law Judge's ruling on Appellant's request for a new hearing and the Procedural Order of September 13, 1993, declined to submit a timely witness list and was unwilling to go forward with the presentation of her case on October 4. As the proponent of an order, the Appellant has the burden of proof in this appeal. *Kerkam v. McKenzie*, 862 F.2d 884); *Burlington v. Department of Educ.*, *supra*. *See also*, C.R.S. 24-4-105. By not going forward with her appeal, the Appellant has failed to meet her burden of proof and the Administrative Law Judge cannot issue a decision on the merits of her appeal. Therefore, the appeal must be dismissed. The Appellant is not guaranteed the right to chose her forum, but only the due process rights afforded by federal and state law. She was given the opportunity for both a local level hearing and an impartial state level review; to begin again would clearly violate the intent of the IDEA and the State Plan. The appeal is therefore dismissed.

RULING

1. The request of Appellant for a new hearing before a different IHO is denied.

2. The Motion to Dismiss the appeal is granted.

DONE AND SIGNED this 8th day of October, 1993.

NANCY A. HOPF
Administrative Law Judge

FOOTNOTES

1/ In her appeal, Appellant raised the issue of denial of the right to legal counsel at the hearing before the Impartial Hearing Officer. However, she acknowledges that she has consulted with legal counsel during this appeal process although no attorney has entered an appearance in this case. Appellant was assisted at the local level hearing by a children's advocate and consultant to the State Board of Education.

2/ Richard Walker of the Division of Administrative Hearings contacted the Appellant and counsel for the District before setting the hearing date. The Appellant declined to participate in the setting because she objected to the process.

3/ The Appellant stated, "I want someone different to hear my case other than the person hearing the Appeal. Just in case, it goes to Appeal then the [Administrative] Law Judge [has] already heard it." This is the first time that the Administrative Law Judge was made aware that the Appellant was requesting a new hearing before some other adjudicator.

4/ She did not advance any credible explanation as to why he would have done so or any factual basis for her belief except that he did not admit all the exhibits she offered into evidence.

5/ Appellant's only stated basis for this belief was that these witnesses were guilty of misconduct in their previous testimony and would not want to repeat that misconduct and therefore would not testify the same a second time.

6/ The request for a *de novo* hearing before a different IHO was only articulated after extensive discussion on October 4, 1993. The October 1 letter was the first time the Appellant explicitly requested that the Administrative Law Judge not conduct the new hearing she had previously requested. The request that a new IHO conduct the hearing was not expressed until October 4. No evidence of bias on the part of Mr. Payne was evident from the existing tape-recording of the hearing and there is no credible evidence of any cause for the blank portions other than mechanical failure or other reason other than tempering. The Administrative Law Judge declines to presume wrongdoing.

Case Number: L93:110

Status: Impartial Hearing Officer Decision

Key Topics: Procedural Safeguards (Notice of Staffing)
Free Appropriate Public Education (FAPE)
Related Services (Recreation)
Compensatory Services

Issues:

- Whether the district violated the procedural safeguards of the Act, thus denying FAPE to the student.
- Whether recreation as a related service is required for the student to derive meaningful benefit from her educational program.
- Whether special olympics can be mandated as a specific recreational methodology.
- Whether compensatory education is warranted.

Decision:

- The District's procedural violations did not deny FAPE.
- The District must provide the student with a recreational program directly tied to the control of the student's inappropriate behavior.
- The District must provide special olympics since it has been unable to come up with an alternative that meets the need for recreation as a related service.
- Compensatory education is required in the form of special olympics.

Discussion:

- Parental dissent over IEP.
- Behavior which is potentially dangerous to student.
- Transportation to special olympics program.
- Notice to parents of IEP meeting.

COLORADO DEPARTMENT OF EDUCATION
Due Process Hearing L93:110

IMPARTIAL HEARING OFFICER DECISION

AK, by and through her parents,

Petitioner,

vs.

COLORADO SPRINGS (EL PASO COUNTY) SCHOOL DISTRICT 11,

Respondent.

Hearing was conducted June 30, 1993, and July 1, 1993, in Colorado Springs, pursuant to a May 18, 1993, complaint under 20 USC section 1415 (E) ("the Act") and a June 2, 1993, notification of appointment to impartial hearing officer (IHO) Elizabeth A. Comeaux, attorney at law.

Petitioner was represented by Leo Finklestein, attorney at law, Pikes Peak Legal Services. Petitioner's evidence consisted of exhibits 1 through 64 and the sworn testimony of eleven witnesses: both of AK's parents, her guardian ad litem Elizabeth Hickey, Esq.; Dr. Marcia Braden, Ph.D., director of the Autistic Screening Instrument for Educational Planning (ASIEP) program, expert witness on autism and educational issues for autistic students; Dr. Robert Tinker, Ph. D., evaluating psychologist and expert witness regarding psychological issues of autistic children; Maria Sklenarik, Pikes Peak regional director of Special Olympics; Jo Ann Nerger, AK's teacher; Kathryn Lane, AK's teaching assistant; Rita Ague, parent of another ASIEP student and certified swim coach for Special Olympics; Karen Selly, evaluating occupational therapist (OT); and Tammy Burns, ASIEP aide.

Respondent was represented by Debra Menken, attorney at law, Holme, Roberts & Owen, LLC. Respondent's evidence consisted of exhibits A through DDD and the sworn testimony of six witnesses: Meredith Jobe, special education supervisor; George T. Marin, special education supervisor; Tracy Deskins, AK's speech/language therapist; Dr. Lewis Byers Jackson, Ed.D., assistant professor at the University of Northern Colorado who served as the district's technical assistant, expert witness concerning education of the severely and profoundly disabled; Jo Ann Driscoll, registered occupational therapist (OT) certified in sensory integration (SI) assessment and therapy, AK's evaluating and treating occupational therapist; and Ronald Hage, respondent district's director of special education.

ISSUES

1. Whether the district violated the procedural safeguards of the Act, thus denying FAPE to the student.

2. Whether recreation as a related service is required for the student to derive meaningful benefit from her educational program.

3. If so, whether special olympics can be mandated as a specific recreational methodology.

4. Whether compensatory education is warranted.

PRELIMINARY MATTERS

This matter is brought under the Individuals with Disabilities Education Act (IDEA) ("the Act") which provides for a due prcess hearing at the parents' request to review whether the student is receiving a free appropriate public education (FAPE) based on an individual education program (IEP) which has been created in accordance with the procedural safeguards contained in the Act.

Jurisdiction is based on 20 U.S.C. section 1415; 34 C.F.R. section 300 et seq; Part VII of the Colorado Department of Education (State Education Agency, or "SEA") State Plan ("State Plan").

The parties presented simultaneous prehearing briefs, followed by simultaneous responses to opposing party's brief. At prehearing conference held June 18, 1993, in Denver, the IHO placed the burden of proof on parents as the party seeking to change the student's IEP by adding recreation as a related service. The last agreed IEP (November 4, 1992) did not include this related service. Accordingly, the burden is properly on the parents to change the status quo in this regard. Johnson v. Indep. Sch. Dist. No. 4 of Bixby, 921 F. 2d 1022, 1026 (10th Cir. 1990); followed in A.E. by and through Evans v. Indep. Sch. Dist. 20, 936 F. 2d 472, 475 (10th Cir. 1991).

The parties agreed that the IHO would meet the student. The student attended a portion of the hearing in which her teacher was testifying, and was in and out for other segments of that first day of hearing, giving the IHO a good general impression of the challenges she faces.

The parties stipulated to the admissibility of all exhibits, whether or not addressed in testimony. The parties agreed to an extension through July 12, 1993, for publication of the impartial hearing officer decision.

FINDINGS OF FACT

1. AK is a 15 year old female autistic student who qualifies for FAPE under the Act. Her educational background is the subject of findings 1 through 31 of exhibit 4, incorporated herein by reference and supported by the record in this hearing. 1/

2. On May 11, 1993, the district imposed a new IEP over the dissent of AK's parents, and over the dissent of the teacher, the psychologist, and the ASIEP program coordinator Dr. Braden. The dissenting individuals had been the consistent core of AK's staffing/ IEP committee for years.

3. Despite the strong dissent to the new IEP, all staffing / IEP committee participants agree that AK must gain control of her running behavior in order to meet her long term educational objective: independent living (in a group home or otherwise) with the ability to travel on her own to work and leisure activities in the community. As of the date this complaint was filed, all participants were also in agreement that AK had received no benefit from her educational program with respect to her running behavior.

4. AK's running behavior is a serious safety issue as well as an obstacle to her ability to attend to the rest of her educational program. She constantly obsesses ("perseverates") on opportunities to run, which in itself distracts her from learning. When she does bolt, she is heedless of traffic and other dangers. For her safety, beginning in September, 1989, she ws on a tot link or lap belt (gentle physical restraints) during school time except when under close 1:1 supervision.

5. AK's strength is visual motor response, which is measured by the certified occupational therapist at slightly over one year above chronological age. Exhibit 47 (GG). In addition, the psychologist measured AK's mental age 2/ to be no less than two years below her chronological age using the nonverbally calibrated Leiter instrument, and noted a marked discrepancy between that result and AK's lower verbal abilities. The psychologist's testimony established that this discrepancy is indicative of a "global, intuitive" thinker rather than a "logical, sequential" learner.3/

6. Another of AK's strengths is her sheer speed and endurance while running. She is also skilled using shop tools and has displayed mechanical aptitudes. She is learning to operate a computer.

7. The new IEP is based on a twofold understanding of the needs driving AK's running behavior. First, AK has strong unmet needs for intense vestibular, sensory-motor and proprioceptive stimulation, as well as for vigorous physical activity, which her body craves. Not only do these needs drive her running behavior, they also "continue to affect (AK's) overall ability for fine

motor tasks, as well as gross motor and classroom functioning." Exhibit 47 (GG).

8. Second, AK's running behavior is assumed to have a motivational component, because her perseverating on opportunities to run is associated in her mind with a target destination. Dr. Jackson, the district's technical advisor, therefore concluded that AK's running behavior stams, in part, from her lack of opportunity to choose from a variety of alternatives those activities of intrinsic motivation to her.

9. The district's mandated IEP also states that AK needs to be able to generalize self-control of running behaviors, once learned, to a variety of environments, as well as to increase mainstreamed activities and socialization opportunities with chronological age peers, typical as well as disabled, in a variety of settings in the school and community.

10. This IEP decrees that AK needs "recreation opportunities provided to other students" of her chronological age in meeting the needs described above. One characteristic of service is "provision for high intensity motor activities in a variety of environments." Another is to provide occupational therapy as per recent evaluation of needs, "through integrated activities throughout AK's school day." (Emphasis added.) Exhibits II and JJ.

11. The certified occupational therapist's report recommends, among other things, "heavy proprioceptive input (through) adaptive P.E. with input of joint compression such as jumping, hopping, running, appropriate karate or martial arts" and other activities such as "scooter board, swinging, roller skating, swimming, (and) tumbling." Exhibit 47 (GG), emphasis added. Further, AK's "overall school program (should) provide appropriate and directed sensory input that is meaningful to her" and "carried out in her daily activities in the classroom under the direction of an occupational therapist." Exhibit CCC, emphasis added.

12. In the opinion of the individuals who had formed the core of AK's staffing/IEP committee for the previous six years, AK needs a "regular, structured, consistent, high intensity, motivational program of recreational services" 4/ to channel her running behaviors and cut down her perseveration on running during times she is not running. The traditional core of the committee had reached the consensus that neither a regular, nor an adaptive, physical education (P.E.) program was adequate to provide these needs, but that a program such as special olympics would be adequate as a recreational program.

13. In fact, AK does need a "regular, structured, consistent, high intensity, motivational program of recreational services" to channel her running behaviors and cut down her perseveration on running during times she is not running. Vigorous physical activity is the strongest and most intrinsic motivator for AK.

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The varied contexts that accompany recreational -- as opposed to merely therapeutic -- activities are also important to her ability to generalize her learning. In the absence of a "regular, structured, consistent, high intensity, motivational program of recreational services " AK is unlikely to learn to control her running behavior.

14. Not only the occupational therapists, but also Dr. Jackson's report, supports the above finding. Dr. Jackson wrote that AK MUST "be provided with the physical education and extracurricular opportunities for running and other forms of physical activity that, while routinely afforded to other students in junior high settings, are not presently part of her school day." Exhibit 46.

15. The parents dissented from the new IEP, in part because the district refused to list recreation -- i.e., special olympics -- as a related service, and in part because they believed the district violated the Act's procedural safeguards by overriding the consensus of the traditional core staffing committee. Under either analysis, the parents believed their daughter was denied FAPE.

16. A third reason for the dissent was the philosophical gulf between Dr. Jackson and the traditional core staffing committee. Simply put, Dr. Jackson's proposal was to increase AK's mainstreaming, increase her ability to choose from an array of intrinsicly interesting activities, remove the tot link and disperse responsibility for AK's safety from her 1:1 teaching assistant to the entire school community. Dr. Jackson describes this as a "layered" rather than "sequential" approach, and describes the ASIEP program as "outdated."

17. A review of the IEP's in the record reveals that the ASEIP program follows behavior modification principles to build the student's mastery incrementally from one skill to the next, in logical sequence.5/

18. Dr. Jackson's "layered rather than sequential" approach is intuitively aligned with AK's learning style as "global, intuitive" rather than "logical, sequential." However, it must be deemed experimental when applied to a student diagnosed with autism. The bulk of scientific data on the effectiveness of educational methods for autistic students supports the ASIEP approach. Mainstreaming has never been shown to be effective in educating autistic children, as it has with regard to other severe and profoundly disabled students.

19. There is no proof that Dr. Jackson's approach will work. But in his considered professional opinion, AK should learn to control her running behavior in six months under his program.

20. The district policy is to refuse to list recreation as a related service for any student who is deriving any benefit whatsoever, in any educational area, from the student's IEP. This is the district's interpretation of the applicable legal

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standard. Should recreation as a related service ever be included in a student's IEP, it is district policy that it be restricted to the classroom wherever possible. The district does not want to set a precedent of providing special olympics as a related service.

21. Dr. Jackson and his professional colleagues actively advocate in opposition to school districts providing special olympics to disabled sutdents as a related service. AK's parents belong to a parent's support group (United Parents) which has advocated for the district to provide special olympics to disabled children with demonstrated need.

22. Special olympics activities rotate in seasonal cycles, depending on the sport. During any one cycle, the schedule generally requires a student to attend a one after-school weekday practice lasting several hours each week for several weeks, then participate in the one day regional meet, followed by a weekend-long state meet. Some activities that can be pursued on these seasonal cycles are swimming, track-and-field, skiing, and horseback riding.

23. AK participated in special olympics swimming from April to June, 1993, and attended a weekend ski trip in early February, 1993. Her behavior when involved in special olympics was noticeably less obsessed with running. She showed improvement in her motivation (and ability) to communicate, and she couldn't get enough of the physical activity. During an awards banquet which was held in June in a room that was encircled by a running track, she did get away twice to try out the running track, but did not leave the room. Despite this occurrence of only slightly questionable appropriateness, she displayed no running behavior during special olympics.

24. AK was not on tot link while at special olympics. The ski tether reported in the testimony is used for all disabled youngsters learning to ski, to avoid a "runaway skier" occurrence. It was not necessary to prevent AK's running behavior, because the activity of skiing interrupted her perseverating on opportunities to run.

25. Participation in special olympics, in and of itself and without district support, can reasonably be expected to provide AK with the following benefits related to her educational objectives:

a. increased variety of activites of intrinsic motivation for AK to choose among, and more intense intrinsic motivation from these sports related activities;

b. increased age-appropriate interactions with both disabled and typical peers in a variety of community settings, including dorm settings on overnights away from family, to assist in generalizing her learning to other meaningful settings;

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c. age-appropriate involvement in therapeutic vigorous physical activity, vestibular stimulation, heavy proprioceptive input, and sensory motor stimulation, when compared to the standard activities and equipment for her therapeutic needs, which are designed for children aged 3 to 9 and are not intrinsicly self-motivating for an adolescent;

d. additional motivator for AK to attend to difficult learning tasks, on the order of, "when you finish, you can go to special olympics;" and

e. structure and dependability of a regular, consistent program to address AK's recreational needs.

Should the district be ordered to provide a trained aide to accompany AK to special olympics practices and events, then it can be reasonably expected AK would derive the following additional benefits:

f. trained reinforcement of skills learned in the school setting;

g. charting of AK's behaviors for assessment purposes, and for refining her IEP;

h. enrichment of the "layered" educational program by extending it to community settings incorporating activities of intense intrinsic value to AK; and

i. trained coaching in how to make use of the opportunities of the "layered" approach to learn to control running behavior.

26. The district's budget can accommodate paying for a 1:1 aide for AK for six hours per week during regular school hours throughout the school year. 7/ By comparison, substituting payment for an aide to accompany AK on the special olympics schedule noted above would not be an unbearable expense.

27. The district is easily able, with no more than negligible expense, to provide transportation to AK for weekday special olympics practices in town. Transportation to regional and state meets would cause an additional expense to the district.

28. There is no need for the district or the parents to provide for overnight accommodations at the special olympics meets; these and other administrative costs of the program are provided free of charge by the private business sponsors of the program.

29. AK's parents are presently both unemployed. This stems partly from the daily demands of protecting AK from her running behavior (though some respite care is available), partly from advocacy activities and the demands of pursuing litigation to address their daughter's educational needs, and partly from other causes not in evidence. AK's parents do not have the resources

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to provide for a trained aide to accompany AK to special olympics activities. The father plans to actively seek work soon, and once he obtains employment he plans to use the family car to get to and from work.

30. It cannot be determined on this record whether or not AK can derive educational benefit, with respect to her running behaviors, from the currently decreed IEP. The IEP is an experiment, pure and simple, and only time will tell whether or not Dr. Jackson was right.6/

31. The following findings are entered with respect to the alleged procedural irregularities.

32. The district asserted an unprecedented administrative presence at the January 15, 1993, IEP staffing. It was this administrative presence which prevented consensus on the need for recreation -- and in particular, special olympics -- as a related service.

33. The administrators who aborted the consensus had little if any first hand knowledge of AK or expertise in the education of autistic students, when compared to the traditional core of the staffing team.

34. Their presence at any IEP staffing was authorized by the applicable regulations, but it was necessary for this staffing only because this staffing was considering a change to the IEP. 8/ Based on information that AK was benefiting from her educational program in areas other than running behavior, the director instructed the administrators not to authorize recreation as a related service.

35. Neither the director nor his two administrators had much opportunity to personally observe AK, although they did review her records to some extent. Marin had had more opportunity than the rest, serving as an intern assisting the principal at East Junior High School where AK received instruction.

36. The newly appointed designee of the director insisted on chairing and recording the proceedings, replacing Dr. Braden's historical role. Parents and other team members protested to no avail. This designee curtailed discussion of the team's consensus of the need for recreation as a related service -- and in particular, special olympics -- for AK to benefit from her education in regards to her running behavior. The designee also neglected to record that this discussion and (excepting only the administrators) consensus had occurred. Instead, she directed to each participant the sole question, "Is AK deriving benefit from her present educational program?" The unanimous answer was yes.

37. The director's designee then stated the district's position that recreation as a related service is not authorized whenever a student is deriving some benefit from the educational program.

At this point, the parents and their advocate announced their intent to leave, having understood that the district had foreclosed discussion by announcing its categorical decision. The designee of the building administrator (another special education supervisor) announced, "This staffing is over!"

38. Less than one hour later, the district's special education director caused the staffing to reconvene. No prior written or oral notice was given the parents, and having no knowledge of the purported reconvening they did not attend. Nor did any other member of the traditional core staffing committee, excepting only AK's teacher, upon whose classroom the administrators descended.

39. At the purported reconvening of the IEP staffing on January 15, 1993, the special education director of the district caused the following statement to be added to the IEP record, above the signatures of staffing team members who had departed at adjournment and were neither present nor invited to the purported reconvening: "Additional related services including recreation and leisure are not required." At the time he directed this addition to the IEP record, the director was well aware that the entire traditional core staffing team (including AK's parents), over all of whose signatures this statement was added, dissented from this statement.

40. The administrative presence of the district described above continued throughout the entire development of the IEP which the parents here protest. When forced to reconvene the staffing and vacate the improper decision, the district continued to disrupt consensus. On the one hand, the district maintained that recreation as a related service was not warranted because the traditional team had had so much success educating the student. On the other hand, the district refused to yield to the traditional staffing team's current consensus for treating AK's running behavior, because the team's previous approaches in that regard had failed.

41. The director caused these administrative actions, in part, because he believed that the parents were asserting a need for recreation as a related service, and in particular special olympics, solely in their capacity as parent advocates for special education students as a group, without regard to AK's individual need. The director testified -- incredibly -- that running behavior had not been a consistent priority in AK's IEP but was created as a ruse to support the advocacy goal of special olympics. Further, to the extent that control of AK's running behavior was a legitimate educational goal, he believed there was no correlation between this goal and recreation as a related service. However, the facts are otherwise, as detailed below.

42. In fact, the traditional team had tried a variety of approaches over the years to address AK's running behavior, which was always identified as a priority in AK's IEP.

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43. The October 24, 1989, IEP contemplated a three part strategy: (1) screen for medication involvement;9/ (2) intensify language therapy to ameliorate the increased expressive frustration accompanying the onset of puberty; and (3) assure safety through tot link and lap belt with the goal of fading these physical restraints through specific, staged programming.

44. These strategies had been developed after assessing previous gains in teaching the student to control other obsessive-compulsive behaviors. The team specifically rejected the strategy of providing activities of intrinsic motivation to the student to distract her from the problem behavior, because that approach had failed to correct another obsessive-compulsive problem behavior.

45. The 1989 strategy met with difficulty when the district failed to provide the speech/language therapist specified in the IEP and removed the 1:1 aide from AK's classroom, disrupting both the direct services of the speech/language therapist and the reinforcement of these services intended to be provided by the 1:1 aide, as well as the implementation of the "fading" of restraints, intended to be performed by the aide. Though budget driven, this decision had not been made with reference to AK's individual needs as reflected in her IEP. These services were reinstated on a permanent, consistent basis in fall, 1990, by order of the administrative law judge after due process hearing.10/

46. The November 6, 1990 IEP included the following related services, all specifically directed at AK's running behaviors: 1:1 aide all day; speech/language therapy four times per week; direct occupational therapy services each week; physical education consultation. The speech/language therapy was compensatory education ordered by the administrative law judge as a result of the due process hearing.

47. The November 14, 1991, IEP included speech/language, occupational therapy consultation, and psychological and educational consultation, community based instruction and vocational training as characteristics of service. This multidisciplinary approach where where "speech" handicapping conditions are present was an integrated feature of the ASIEP program, and parenthetically consistent with a recent district memorandum on the subject.

48. In July, 1992, still concerned with AK's running behavior, her father initiated federal complaint 92:507 regarding recreation as a related service, and preliminary proceedings began. His complaint was filed partly in his capacity as AK's father, and partly in his capacity as a parent advocate for special education students generally. In his complaint, he stated,

> "In the case of my own daughter, she badly needs recreational opportunities. I would like to have her

participate in Special Olympics bowling starting this fall and then get into other recreational activities and sports but the teachers and aides in her program are kept very busy and the district does not offer them any kind of stipend to spend after school or weekend time doing this. And it doesn't offer transportation to get her to practices and events like it does for regular education students." He sent a copy to Dr. Braden. Exhibit 9.

49. In October, 1992, a note was added to AK's IEP indicating that henceforth she would be on a tot-link or lap restraint only at the discretion of the teaching assistant, and then only for no more than 30 minutes at a time. This is the first documentation that the fading procedure had finally begun, but the evidence is unclear whether this note was actually implemented.

50. The federal complaint investigative process provided much needed education to parents, teachers, and administrators about the procedure to follow, and the substantive standard that must be met, when considering recreation as a related service. As a result, steps were taken by AK's parents, teachers, and administrators with regard to this issue.

51. On October 1, 1992, the special education coordinator issued a memorandum requiring administrative representation at each IEP staffing. The purpose for this memorandum was not indicated, and Dr. Braden had no reason to believe she was not in compliance in continuing her traditional role as the director's designee, while including the building's assistant principle, and chairing IEP staffings.

52. The November 4, 1992 IEP had recognized that AK "requires 1:1 supervision, monitor" to "maintain control of running behavior" and needs to learn "safety in the community," "increase awareness of danger," and "improve ability to generalize." Community based instruction, a characteristic of service added the prior year, was continued in this year, reflecting AK's adolescent need for prevocational activities and implicitly reflecting the growing importance of controlling the running behavior.

53. AK's November 4, 1992 IEP had not specified that control of her running behavior was her top educational priority, nor that recreation as a related service was warranted. It was apparently this omission that caused the director to conclude, without a thorough understanding of AK's educational profile, that her running behavior was not a serious problem.

54. On November 12, 1992, AK's parents made a formal request to include recreation as a related service -- and in particular special olympics -- in AK's IEP. Dr. Braden referred it through channels, mentioning to the parents what the parents already knew, i.e. that the District policy was not to grant this request. She did not reconvene the IEP staffing. The parents advised the federal complaint investigator of this development.

55. The January 15, 1993, staffing convered as a result of the November 30, 1992, order by the investigator in federal complaint 92-507 for the specific purpose of considering whether there was a need for recreation as a related service for AK.

56. Whereas the original emphasis in the team's treatment approach regarding the running behavior had been speech/ language therapy, occupational therapy had also been specified, either as a characteristic of service, or as a related service, since at least 1989. However, there is no evidence in this record of any comprehensive OT evaluation until the traditional core staffing committee made an issue of it in the January 15, 1993, staffing. It was the evaluation of AK by two occupational therapists that finally documented her intense need for stimulation of her vestibular, proprioceptive, and sensory motor systems, and for vigorous physical exercise, both with specific regard to controlling her running behavior, and with regard to her ability to learn in general. These assessments were obtained in February and April, 1993.

57. AK's traditional core staffing committee, consisting of her teacher, teaching assistant, evaluating psychologist, AK's parents, and the ASIEP program coordinator Dr. Braden, all agree that recreation as a related service is necessary for AK to derive meaningful benefit from her educational program with regard to her running behavior. Her speech/language therapist Tracy Deskins agreed with this position as of the January 15, 1993, and the January 27, 1993, staffings, but testified to the contrary at hearing. Additionally, the occupational therapist who provided the first evaluation in February 1993 agrees with this perspective.

58. Dr. Jackson and the certified occupational therapist, Jo Ann Driscoll, believe that AK can overcome her running behavior in the absence of recreation as a related service, provided the recommendations each have presented are followed completely, and further provided that Driscoll follows Selly's recommendations for intense direct occupational therapy tapering off to consultative occupational therapy as AK's response warrants.

59. No witness testified that special olympics was the only recreational service that could meet AK's needs. The overwhelming testimony with regard to special olympics was that it was a congruent match with all of AK's educational objectives, a dependable and established program already in place, and one that would be relatively inexpensive and uncomplicated to incorporate into her IEP. It is one way of meeting AK's need for recreation as a related service.

60. There is an unspecified window of opportunity for AK to master her running behaviors, and after that it will be too late. The time is here; results must be achieved.

DISCUSSION

The "free appropriate public education" mandated by the Act is defined as "special education and related services", provided in a "classroom, ... or other setting," including instruction in physical education, under the auspices of an individual educational program (IEP) of specially designed instruction to meet the child's unique needs. 20 USC 1401 (a) (16), (18), (20), 34 CFR 300.8, 300.340-350

"Related services" mean all supportive services as may be required to assist the child to benefit from her special education, and specifically include recreational services where appropriate. 20 USC 1401 (a) (17); 34 CFR 300.16.

Recreation as a related service is defined to include "therapeutic recreation services" and "recreation programs in schools and community agencies," as well as "leisure education" and "assessment of leisure function." 20 USC section 1401(a)(17); 34 CFR section 300.16(9).

There are two tests for determining whether an IEP provides the free appropriate public education guaranteed by the Act. The first is whether the LEA has complied with the procedural safeguards, and the second is whether under all the circumstances the IEP is reasonably calculated to confer meaningful educational benefit on the child, given the child's individualized needs. Board of Education v Rowley, 458 U.S. 176 (1982). An LEA satisfies the FAPE requirement:

> by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction. 102 S. Ct. at 3049. (Emphasis added.)

Related services may actually be necessary as the central and most essential core of a child's education:

> The education program of a handicapped child, particularly a severely handicapped child ... is very different from that of a non-handicapped child. The program may consist largely of "related services" such as physical, occupational, or speech therapy." Polk v Central Susquehanna Intermediate Unit 16, 853 F. 2d 171, 176 (3rd Cir 1988). (Citations omitted.)

The importance of related services stems from the fact that maladaptive behaviors must be addressed in the IEP just as thoroughly as academic concerns. Honig v. Doe, 484 U.S. 305 (1988); Burke County Bd. of Educ. v. Denton, 895 F. 2d 973 (4th Cir. 1990).

The SEA federal complaints coordinator framed the substantive standard in this manner:

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> Pursuant to the Act, students with disabilities who are unable to receive reasonable benefit from regular education are entitled to special education *and related services* tailored to meet their individual needs and designed to provide them with reasonable benefit from their education program. Exhibit 12, page seven.

Whether this "reasonable benefit" standard has been met is to be determined from a consideration of all relevant facts. *Alamo Heights Independent School District v State Board of Education*, 790 F.2d 1153 (5th Cir. 1986)

1.

The parents assert that the district violated the procedural safeguards of the Act, resulting in a denial of FAPE to AK. In this assertion, they rely on the court's statement in *Rowley*:

> We think that the Congressional emphasis upon full participation of concerned parties throughout the development of the IEP ... demonstrates the legislative conviction that adequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP. 458 U.S. at 205-07.

The federal courts applying this principle have found a denial of FAPE when the procedural violations are serious. *Hall v. Vance County Board of Education*, 774 F. 2d 629 (4th Cir. 1985) (parents not advised of their procedural rights, over a lengthy period of years). But when the procedural violations are minor, the courts have not found a denial of FAPE. *Burke County*, *supra* (parents not given notice; IEP developed four days later than required); *Livingston v. DeSoto*, 782 F. Supp. 1173 (N.D. Miss. 1992) (failure to provide staffing to discuss private placement not a denial of FAPE, where parent had already made up her mind to move child to private school).

In this case involving AK, her parents have proved their contentions that the district:

(a) failed to provide an adequate record of the staffings as required by State Plan Part V.E.2.F.(9);

(b) failed to give the required written notice to the parents of the purported reconvening on January 15, 1993; and

(c) falsely inserted a purported "team decision" over signatures of participants known to dissent.

However, these violations are *de minimus*. The second two were cured when the director vacated the results of the purported "reconvening" of the January 15, 1993, staffing. And the first has affected credibility determinations in this proceeding, rather than determine its outcome.

The parents' remaining contentions that the district violated procedural safeguards all relate to the requirement of consensus.

Consensus, rather than majority rule, is said to have been the standard because majority rule would have allowed for "packing" the meeting to manipulate the vote. *Doe v. Maher*, 793 F. 2d 1470, 1488-90 (9th Cir. 1986), *cert. granted in part*, *Honig v. Doe*, 479 U.S. 1084, *aff'd. as modified*, 484 U.S. 305. As the facts of this case demonstrate, it is also possible by orchestrating the meeting attendees to disrupt consensus.

The federal regulations provide that staffings involving proposed changes, as distinct from those maintaining the current program, should be attended by an administrator with authority to commit agency resources, to avoid the possibility of agreed programs being vetoed at a higher level. 34 C.F.R. Part 300, Appendix C. This compares to the permissive provisions regarding administrator presence in the State Plan, Part II, after paragraph V.E.2.k.

What is ironic on the facts of this case is that administrators, ordered by the federal complaints investigator to convene a staffing to determine whether recreation as a related service is warranted for this unique child, used their presence to disrupt the consensus that had developed among the child's traditional core staffing committee. The convoluted loop is frustrating, but seems to be authorized by the regulatory scheme.

This is apparently because there must be some method for coming to closure when the positions of the parties are as entrenched as they are here. That method is clear on the authorities provided the IHO. It falls to the district to make the IEP decision, subject to the parents' right to a due process hearing. *Doe v. Maher*, *supra*; 1987 EHLR 211.436 (February 6, 1987); 34 CFR Part 300, Appendix C.

Accessing these provisions, even though disrupting consensus in the process, does not constitute violation of procedural safeguards by the district.

Therefore, the IHO cannot conclude that the district's procedural violations denied FAPE.

2.

The second issue is whether recreation as a related service is required for AK to derive meaningful benefit from her educational program. This is the standard of the *Rowley* case as explained in *Polk*, *supra*. It has become a truism that the standard quantum of benefit is more than "trivial," but less than "maximizing." The determination whether the standard has been met must be made on a case by case basis, upon analysis of all relevant facts. *Alamo Heights*, *supra*.

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The district stands on its position that, so long as AK is deriving "some" benefit, from any part of her educational program, she is not entitled to recreation as a related service to address her running behavior. Based on AK's increase in mental age as measured on the Leiter scale, her gains in controlling other obsessive-compulsive behaviors, and her increased language abilities, the district maintains it is not legally obligated to provide recreation as a related service.

The parents, by contrast, argue that the legal standard should be applied, not to AK's benefit from other portions of her educational program, but to her benefit (or lack of benefit) with regard to her running behavior. They characterize the district's position as "since a child is doing well in English, we need not teach her math."

The parents' interpretation persuades the impartial hearing officer. There is agreement that AK's running behavior must be addressed, the time has come. There is sound reason why maladaptive behaviors can be the very heart of educational targets for the disabled. Honig, supra. Control of running behavior is AK's number one educational objective.

In AK's case, not only does her running behavior jeopardize life and limb of herself and others, causing serious and legitimate liability concerns for any service provider, educational institution, or future workplace or group home, the failure to master this behavior represents in a global or metaphorical, but very fundamental and real, way her failure to benefit from her education generally.

The overall import of the evidence is that, once AK "gets" an understanding of how to control her running behavior, she will have crossed a threshold of major importance in integrating all prior learning and facilitating all future learning. Not only that, but she will have overcome the single remaining major obstacle to her general, long term educational objective of relative independence as an adult. The converse is also true, unfortunately, in that until she "gets" this important lesson, all her prior success is for naught, because her ability to live independently will most certainly be curtailed.

The cases reflect the courts' and IHO's views that, where a disabled student is meeting her educational objectives adequately despite her disability, related services are not required. E.g., Rowley, (mainstreamed hearing impaired student who was performing above average, held to have adequate related services in the form of a special hearing aid and tutor, requested qualified sign language interpreter not warranted); 18:108 (San Luis Valley B.O.C.S., July 3, 1991)(perceptual/ communicative handicapped child not entitled to direct --as opposed to consultative -- occupational therapy, where she was progressing adequately in overall educational program, despite her difficulties with regard to fine motor and gross motor skills).

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But where disabled students have been found unable to meet their educational objectives, without related services, such services have been ordered. *Polk*, *supra* (severely mentally disabled student, agreed to be receiving some benefit from current IEP, nevertheless entitled to hearing to determine whether he needs related service of direct physical therapy to meet his individualized needs), *Alamo Heights*, *supra* (transportation one mile out of school district boundary); *Irving Independent School District v. Tatro*, 468 U.S. 883 (1984) (school personnel must perform simple medical procedure to enable a spina bifida student to discharge urine, since procedure is required every 3 to 4 hours and if not provided at school, student could not participate); L89:100 (Denver Public School District 1, April 24, 1989) (emotionally disturbed student entitled to psychological counseling as related service where emotional problem totally blocked her ability to derive educational benefit).

Recreation *as a related service* has not been addressed in the due process hearings in Colorado, to the IHO's knowledge. Recreations *as a characteristic of service* was ordered in L92:105 (Colorado Springs School District 11, June 3, 1992). In L92:105, the IHO found that the student's need to "explore and take part in leisure activities" was "an important facet of helping him function in society," and that therefore recreational activities needed to be included as a characteristic of service.

The difference between recreation as a "related service" and recreation as an "extracurricular activity" is defined in the district's own policy. As a "related service," recreation must be "tied directly to specific goals and objectives on the IEP." This requirement does not apply to recreation as an "extracurricular activity," in which the student is merely pursuing an activity of interest and exploring opportunities to make new friends. Exhibit Y.

Dr. Jackson's report suggested that AK participate in "extracurricular activities" involving running and other physical activities in order to address her running behavior. Dr. Jackson mis-used the term "extracurricular activities" under the definition in the district's policy.

Additionally, Nerger -- who is not only AK's (former) teacher but a certified adaptive P.E. instructor as well -- testified convincingly that adaptive P.E. was insufficient to meet AK's needs, and that mainstreamed P.E. could meet her only some of her needs. Driscoll's discounting of recreation as a related service was premised on the faulty assumption that a "recreation therapist" rather than trained special education personnel would have to administer the services.

The detailed findings above establish that AK needs a great deal in the way of recreational opportunities, physical activity, social interaction, generalization of learning and of learning opportunity to varied community settings, and structured opportunities for same. She needs these services for the singular reason of addressing her number one educational objective. All of these needs are recognized in the IEP, but the district was reticent either to frame them as "recreation as a related service."

Further, the IHO cannot discount the credibility of the members of AK's traditional core staffing committee who have known and worked with her over the years. Their steadfast opinion is that she needs recreation as a related service.

The IHO concludes from all of the foregoing that AK needs recreation as a related service, and that it need not be limited to the school day. The district must provide AK with a recreational program which is "regular, structured, consistent, high intensity, motivational" and tied directly to the specific objective of control of running behavior.

3.

Having established that AK is entitled to recreation as a related service, the next question is whether special olympics can be ordered as a specific recreational methodology.10/

The ability of the parents to impose a specific methodology upon the school district is severely curtailed. Lachman v. Illinois State Board of Education, 852 F.2d 290 (7th Cir. 1988).

A number of the witnesses made the point, persuasive to the IHO, that the district has been unable to come up with an alternative to special olympics that meets AK's unique needs for recreation as a related service. The district is exasperated with the parents for refusing the offer of swimming instruction at the Y.M.C.A. However, this offer had none of the "layered" components that the district itself is now committed to, whereas special olympics with an assisting aide most definitely does.

Should the IHO be utterly constrained by the Lachman principle, there will be no closure to this endless discussion. The parties will go back to the IEP staffing and fail to reach consensus as to what constitutes adequate recreation as a related service. AK's needs will again be swamped by the policy debate in which her parents and her district are embroiled.

Therefore, the IHO does impose the requirement that the district chart the occurrences of AK's attempted and actual running behaviors, and that the staffing/IEP committee review AK's progress no later than January 15, 1994, to determine whether she has decreased such occurrences by 50% by that time. Thereafter, there shall be twice-yearly reviews of AK's running behavior to assure she continues to progress -- at the rate of 50% reduction each assessment -- until the behavior is completely replaced by more appropriate behaviors.

If AK has not made at least this much documented progress by January 15, 1994, or if at any time she relapses from the standard set above, then the district shall be obligated to provide special olympics as a related service.

If required to provide special olympics as a related service under this order, the district shall provide transportation and a 1:1 trained aide to implement educational programs in regard to AK's running behavior, as well as to chart AK's progress. These support services shall be provided to enable AK to participate in continuous special olympics (as provided by the special olympics association) for a full six months.

In the event AK participates in special olympics under this order, a review of her progress in controlling her running behavior shall occur six months after her first participation in any special olympics activity under this order, and if her running behavior has not decreased by at least 50%, the district shall thenceforth be relieved of its obligation to provide her with special olympics as the specific methodology of recreation as a related service.

If, on assessment of the effect of participation in mandated special olympics, AK's running behavior has decreased by 50% or more, the district shall continue to provide special olympics until such time as her running behavior has been completely replaced by appropriate behaviors and has remained so replaced for a period of one full year.

4.

Next we must consider whether any compensatory education is warranted as a remedy.

The standard remedy for failure to provide FAPE is to reimburse parents for providing the service which the local educational agency (LEA) ought to have provided but failed to provide. Burlington Sch. Comm. v. Massachusetts Dep't. of Educ., 471 U.S. 359, 369 (1985).

When the parents do not have the financial resources to provide the appropriate education upon the LEA's failure to do so, the proper remedy is compensatory education. Lester H. by Octavia P. v. Gilhool, 916 F.2d 865 (3rd Cir. 1990) (extending mandatory provision of special education by LEA by two and one-half years to compensate for that period of time the LEA failed to provide FAPE); Miener v. State of Missouri, 800 F.2d 749 (8th Cir. 1986) See also, Response to Inquiry, 17 EHLR 522 (February 13, 1991).

AK is entitled to compensatory education dating from January 15, 1993, the date set by the federal compliance investigator for the district to address her parents' request for recreation as a related service. This compensatory education must be in the form previously denied, i.e., recreation.

So as not to compete with the district's obligation to provide ongoing recreation as a related service in any form that the district chooses henceforth, compensatory education will be ordered in the form of special olympics.

The following order has to do with compensatory education only, and is not to be confused with the order set forth in section 3 above.

As compensatory education, the district shall provide local transportation and a paid 1:1 trained aide for AK to participate in one cycle of recreational activities provided through the special olympics organization. The next available cycle of special olympics shall be the one provided by the district. Transportation expenses for out of town activities for this one cycle shall be borne by the parents or by private contributions generated by the parents or by their advocacy group. If these transportation expenses are met, the district shall provide a 1:1 trained aide to accompany AK to the out of town activities.

CONCLUSIONS OF LAW

1. None of the district's violations of the procedural safeguards of the Act were serious enough to deny FAPE.

2. Recreation as a related service is required for the student to derive meaningful benefit from her educational program.

3. Special olympics cannot be mandated as a specific recreational methodology absent a showing that the district's recreational services are not resulting in AK's progress toward control of her running behavior. A contingent order is rendered, to become effective if specific standards are not met by a date certain.

4. AK is entitled to compensatory education (recreation as a related service) from January 15, 1993. It is ordered in the form of district support of one cycle of special olympics.

ORDER

The district shall proceed with all deliberate speed to support AK's achievement of her educational goal, control of running behavior, through means determined by the district in the event of lack of consent of the staffing / IEP committee.

Such means shall include recreation as a related service in whatever form the district selects, so long as such recreational services are "regular, structured, consistent, high intensity, and motivational" and coincide with the "layered" methodology of the current IEP.

If by January 15, 1994, the district cannot demonstrate by reasonably accurate documentation that AK's running behavior has decreased by 50%, then the provisions of the order contained in section 3 above shall activate, and the district shall provide special olympics as a specific methodology of recreation as a related service under the terms set forth above.

Additionally, as compensatory education, the district shall provide AK with local transportation and a 1:1 trained aide for one cycle of special olympics, that being the next available cycle, under terms set forth in section 4 above.

NOTICE OF APPEAL RIGHTS

This impartial hearing officer decision will go to the parents, the superintendent of the Colorado Springs (El Paso County) School District 11, and the Colorado Department of Education.

If dissatisfied with this decision, or with any of the findings or conclusions incorporated in it, either party may request a state level review by filing or mailing a notice of appeal and designation of the transcript with or to the State Division of Administrative Hearings within 30 days after receipt of the IHO's decision. At the same time, the appealing party shall mail copies of these documents to the Colorado Department of Education and to the other party in the proceeding before the IHO at his or its last known address. Within five days of recept of a notice of appeal, any other party may file a cross-appeal.

The required contents of the notice of appeal, notice of cross-appeal, and designation of transcript are stated in the Impartial Due Process Hearing section of the Colorado State Plan, FY 1992-94. An administrative law judge will be appointed to hear the appeal. Any party wishing to appeal this order has the same rights as he or it had for this hearing. Either party may appeal to the court of appropriate jurisdiction if dissatisfied with the final order.

Elizabeth A Comeaux

Dated this _____ day
of July, 1993, at
Denver, Colorado.

Elizabeth A. Comeaux
Attorney at Law

ENDNOTES

1/ With the exception that the parents' consented to tot link and lap belt in September rather than December, 1989.

2/ However, Dr. Tinker measured AK's "overall" functional level at 4 years, compared to her then chronological age of 14 years 3 months.

3/ The difference between "global, intuitive" and "logical, sequential" learning was not elaborated in the evidence. "Global" is defined as "entire, all inclusive," and "intuitive" as "perceived by the mind without the intervention of any process of thought." By contrast, "logical" relates to "logic" which is "the normative science which investigates the principles of valid reasoning and correct inference, either from the general to the particular (deductive logic) or from the particular to the general (inductive logic); the basic principles of reasoning developed by and applicable to any field of knowledge." And "sequential" means characterized by or forming a "sequence," which means "the process or fact of following in space, time, or thought; succession or order ... an effect or consequence." Funk and Wagnalls Standard Dictionary, Comprehensive International Edition, 1970.

4/ Quotation is from Nerger's testimony.

5/Dr. Braden's contract -- and the ASIEP program -- have been terminated by the district.

6/ Driscoll testified that AK had been with her to community settings and on the running track, and that every verbalized indication that AK wanted to run was successfully redirected by Driscoll to the running track. AK is no longer on the tot link while attending school. These are impressive changes from the constant use of the tot link reported just prior to the January 15, 1993 staffing. However, there have been other times in the past in which the use of the tot line has been "faded" to six feet, and in which it was removed and used only at the teaching assistant's discretion (and then only for 30 minute intervals), but these gains have not held nor improved. It is simply too soon to know whether or not the Jackson approach will work.

7/ This is established by the district's offer to pull AK out of her school day, transport her across town to the Y.M.C.A. for a private lesson, and provide an accompanying aide. The parents declined on the basis that AK would not have the benefit of socialization with other youth, and would lose out on educational programs scheduled during her school day.

8/ It was not necessary, as the district maintains, to comply with the report of the investigator in federal complaint 92:507, or with the director's October, 1992, memorandum, exhibit VV. Dr. Braden had always acted as the director's designee under the

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terms of her contract, and that role had not been removed. In addition, the IEP staffings had always included the assistant building principal.

9/A series of new aides did rotate through AK's classroom beginning with the April, 1990, hearing before the impartial hearing officer, but it was not until the fall of 1990 that a permanent teaching assistant was hired.

10/ The IHO is aware that, in a case where this district was found to have ignored special olympics as a "characteristic of service" written into the IEP, all that was required to honor that commitment was give notice of events to the parents, excuse the student from school for events, and use best efforts to encourage participation of district staff in the events. L90:102 (Colorado Springs School District 11, June 5, 1990). A request to add special olympics as a "characteristic of service" in another student's IEP was denied because of the lack of any reasonable relationship, on the evidence at hearing, between the presenting problem of low self esteem and the methodology of special olympics. L92:119 (Colorado Springs School District 11, December 31, 1992). These cases present different facts, distinguishable from AK's educational dilemma.

CERTIFICATE OF MAILING

This shall certify that on this 12th day of July, 1993, I placed a true and correct copy of the foregoing Impartial Hearing Officer Decision in the United States mail, first class postage prepaid, addressed to each of the following:

Colorado Department of Education
Special Education Services Unit
201 East Colfax Avenue
Denver, Colorado 80203-1704
Attention: Kathy King

Deborah S. Menkins, Esq.
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Colorado Springs, Colorado 80903-4089

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Elizabeth A Comeau

Case Number: S93:110

Status: State Level Review

Key Topics: Free Appropriate Public Education (FAPE)
Related Services (Recreation)
Compensatory Services

Issues:

- Whether the district violated the procedural safeguards of the Act, thus denying FAPE to the student.
- Whether recreation as a related service is required for the student to derive meaningful benefit from her educational program.
- Whether special olympics can be mandated as a specific recreational methodology.
- Whether compensatory education is warranted.

Decision:

- A new IEP shall be written which shall address student's running behavior in a manner reasonably calculated to provide educational benefit with respect to that behavior.
- Related services shall be provided to address sensory deficits unrelated to running behavior.
- Compensatory education shall be provided in the form of special olympics for one year.

Discussion:

- District's obligations to consider student's need for related services.
- District's obligations to address student's running behavior both inside and outside of school.
- Need for specialized services for sensory deficits.

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BEFORE THE STATE BOARD OF EDUCATION
STATE OF COLORADO

CASE NO. ED 93-07

DECISION UPON STATE LEVEL REVIEW

COLORADO SPRINGS SCHOOL DISTRICT NO. 11,

Appellant,

v.

A[redacted] K[redacted], by and through her parents
[redacted]

Appellee/Cross-Appellant.

This is a state level review of a decision of an impartial hearing officer pursuant to the Individuals with Disabilities Education Act, 20 U.S.C. Sections 1400 *et seq.* ("the Act" or "IDEA") and Part II, Section B, VII of the State Plan of the Colorado Department of Education, Fiscal Years 1992-94 ("the State Plan").

An evidentiary hearing was held before an impartial hearing officer ("IHO") in accordance with the Act and the State Plan on June 30 and July 1, 1993. A written decision was issued on July 12, 1993.

An appeal was subsequently filed by the Colorado Springs School District No. 11 ("the District") and a cross-appeal was filed by the student, A[redacted] K[redacted], through her parents, [redacted] (these individuals will be referred to as "A[redacted]" or "the parents"). Opening briefs were filed by the parties on September 9, 1993 and response briefs on September 15, 1993. Upon request of the District, an additional evidentiary hearing was held in this state level review proceeding on September 27, 1993 and oral argument was held on September 29, 1993, at which time this matter was ready for decision. The parties have waived the time limits set forth in the State Plan and the federal regulations with respect to this state level review. Issuance of the decision in this matter has been delayed, in part, by family health emergencies in the Administrative Law Judge's family.

A[redacted] and her parents are represented in this matter by Leo L. Finkelstein, Esq., Pikes Peak Legal Services. The District is represented by Deborah S. Menkins, Esq., Holme, Roberts & Owen, LLC. [redacted] was present during portions of both the IHO and state level review evidentiary hearings.

SCOPE OF REVIEW

The IHO made extensive findings of fact her July 12, 1993 decision. [redacted] and her parents do not contest these findings; however, the District challenges many of them as inaccurate. In addition, substantial additional evidence was taken by the Administrative Law Judge in connection with the state level review. Most of this evidence related to events which occurred subsequent to the IHO hearing. Nevertheless, a good deal of this evidence potentially impacts on the IHO's findings concerning [redacted]'s current status and likely future behavior. Consequently, it is necessary to reach a determination as to the scope and standard of review applicable to this proceeding, including consideration of the extent to which the IHO's findings of fact are entitled to deference and the manner in which the additional evidence taken by the Administrative Law Judge is to be treated.

Pursuant to the Act and the State Plan, the Administrative Law Judge's decision on state level review is to be an "independent" one and the reviewing officer is permitted to seek and accept additional evidence, if necessary. 20 U.S.C. Section 1415(c) and (d); 34 C.F.R. 300:510; State Plan Part II, B, VII, B, 9. Similarly, following issuance of a final state decision, any aggrieved party may file a civil action for review in state or federal district court, in which review the court may take additional evidence, 20 U.S.C. Section 1415(e)(2), and is also required to render an independent decision, based on a preponderance of the evidence while giving due weight to the findings at the state level. *Board of Education of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176, 206 (1982) ("Rowley"); *Russell by Russell v. Jefferson School District*, 609 F.Supp. 605 (N.D. Cal 1985); *Burke County Board of Education v. Denton*, 895 F.2d 973 (4th Cir. 1990); *Roland M. v. Concord School Committee*, 910 F.2d 983 (1st Cir. 1990); *Ahern v. Keene*, 593 F.Supp. 902 (D.Del. 1984).

Because the reviewing officer in a state level review and the trial court judge on review of a state level decision are both required to make independent decisions and may take additional evidence, they are in analogous positions. Thus, case law defining the standard and nature of review of state decisions at the district court level is useful in defining the scope and standard of review applicable here in reviewing the factual findings of the IHO. A district court has discretion to give appropriate weight to the findings of the state administrative agency. *Town of Burlington v. Department of Education, Commonwealth of Massachusetts*, 736 F.2d 773, 791-92 (1st Cir. 1984), *aff'd on other* *grds, sub nom School Committee of the Town of Burlington v. Department of Education of Massachusetts*, 471 U.S. 359 (1985). While some deference to the factual findings of the IHO makes sense in order not to negate the significance of the hearing at the administrative level, *Kerkam v. McKenzie*, 862 F.2d 884 (D.C. Cir. 1988), such deference must be more limited than would normally be the case in reviews of agency fact-finding, in light of statutory provisions for independent decisions and additional evidence-taking. *Doyle v. Arlington County School Board*, 953 F.2d 100 (4th Cir. 1991); *Kerkam v. McKenzie, supra*.

Thus, the findings of fact set forth below reflect this standard of review. The Administrative Law Judge has made independent factual determinations giving due deference to the findings of the IHO as to all matters of contested fact before the IHO. As to all matters of contested fact relating to events occurring after the IHO hearing, the Administrative Law Judge has exercised her independent judgment giving due deference as appropriate to determinations of the IHO which impact on these issues.

PRELIMINARY MATTERS

A. The parties entered into the following Stipulation prior to the commencement of the September 1993 evidentiary hearing:

> 1. The two child neglect reports by District 11 personnel relating to A[redacted] K[redacted], dated July 15, 1993 and August 27, 1993 and previously submitted to the A.L.J. for in-camera inspection, were determined to be unfounded by the El Paso County Department of Social Services and shall not be a part of the record in this case.
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> 2. By this Stipulation, it is not to be inferred that District 11 personnel acted inappropriately in any way in submitting the two reports to the Department of Social Services or that the District agrees with the determination of the Department of Social Services.

In issuing this decision, the Administrative Law Judge has given no consideration whatsoever to these reports.

B. At the IHO level the parents sought to establish that A[redacted]s IEP was inappropriate under the Act and that the District had failed to comply with the Act's procedural requirements. Because the parents sought to change the status quo and to challenge the existing IEP, they properly bear the burden of proof. *Johnson v. Independent School District No. 4 of Bixby*, 921 F.2d 1022 (10th Cir. 1990).

DECISION OF IHO AND ISSUES UPON STATE LEVEL REVIEW

In her decision, the IHO determined that while the District had engaged in procedural violations in connection with A[redacted]'s triennial review, none of these violations was serious enough to have denied A[redacted] a free appropriate public education. The IHO further found that A[redacted] required recreation as a related service to address her running behavior and to derive meaningful benefit from her education, but determined that special olympics as a related service, as requested by the parents, could not be mandated absent a showing that the District's proffered plan, including recreational services, was unsuccessful. The IHO therefore entered a contingent order for special olympics in the event the District's program was unsuccessful. The IHO also ordered compensatory education for A[redacted] in the form of recreation as a related service, specifically special olympics.

On the state level review, the District asserts:

1. The parents failed to sustain their burden of proving that the District must provide A[redacted] with recreation as a related service, and specifically, special olympics; and

2. A[redacted] is not entitled to compensatory education.

3. The District also challenges the IHO's order as inappropriate and unworkable.

A[redacted] and her parents cross appeal with respect to two issues. They assert:

1. The IHO erred in concluding that the District's violations of the procedural safeguards of the IDEA were not serious enough or otherwise did not deny A[redacted] a free appropriate public education;

2. A[redacted] should be granted special olympics as appropriate relief.

FINDINGS OF FACT

The Administrative Law Judge makes the following findings of fact with respect to matters presented at the IHO hearing.

1. A[redacted] is a 15 year-old (DOB July 20, 1978) with multiple handicaps and autism. She has participated in the District's Autistic Screening Instrument for Education Planning Program ("ASIEP") for ten of the last eleven years.

2. A[redacted]'s educational history is contained in a 1990 Decision Upon State Level Review (involving an issue different from the one before this Administrative Law Judge), which was incorporated by reference in the IHO's decision in this case. A short summary of those findings, as relevant here, follows:

a. Autistic children such as A[redacted] exhibit bizarre behavior such as biting and hand mannerisms, severe language deficits, echolalia (repeating back words that are heard), and an inability to interact with people.

b. In approximately August 1989, before the beginning of the academic school year, A[redacted] developed the behavior of running away unless she was restrained or under extremely close supervision. This running behavior continued into the school year and the school setting and was of significant concern. A[redacted] literally ran away from the location where she was to be (home, school, or after-school respite care). A[redacted] would run anywhere from six blocks to a mile before she was caught. The Administrative Law Judge in 1990 found that A[redacted] did not comprehend danger or have an awareness of hazardous conditions and ran into busy streets without heeding traffic, and thus found that A[redacted]'s running behavior was life-threatening.

3. A[redacted] continues to the present time to exhibit running behavior and not to comprehend danger or have an adequate awareness of hazardous conditions. Her running behavior therefore continues to be life-threatening. A[redacted]'s running behavior is an autistic behavior.

4. The ASIEP program, which began in approximately 1980 and continues to the present is a special education program based on behavioral modification principles to build a student's mastery incrementally and sequentially from one skill to the next, in logical sequence. The program is specifically designed to address the needs of autistic children. Until the summer of 1993, when the District chose not to renew her contract, the program was coordinated and directed by Marcia Braden, Ph.D., an independent contractor hired by the District.

5. During her tenure as coordinator of ASIEP, Braden was responsible for the selection and training of the full-time teachers and aides who directly provided services for the program's participants. Braden also directly supervised other professionals (such as an occupational therapist and a clinical psychologist) who also provided direct services to the participants.

6. While the District's ASIEP program has continued following Braden's disassociation with it, and A[redacted] continues to participate in it, A[redacted]s teachers and aides are all new for the 1993-94 school year.

7. Since at least 1989, A[redacted]'s Individual Education Programs ("IEP")[1] have recognized A[redacted]'s running as a problem requiring priority attention as part of A[redacted]'s education. In the fall of 1989 A[redacted]'s IEP, formulated after a triennial review,[2] indicated that A[redacted] would receive behavioral management, including restraining from running. At this time, for A[redacted]'s safety, the ASIEP program instituted a program of using physical restraints for A[redacted] in the form of a "tot-link" or lab belt during school time except when under close one-on-one supervision.

8. A[redacted]'s 1989 IEP identified as one of A[redacted]'s needs fading or gradually phasing out physical restraints during one-on-one sessions and involved a three part strategy for dealing with A[redacted]'s running: (1) screening for medication involvement; (2) intensifying language therapy to ameliorate the increased expressive frustration accompanying the onset of puberty; and (3) assuring safety through the tot-link and lap belt with the goal of fading these physical restraints through specific, staged programming.

9. Subsequent to this IEP, various unsuccessful efforts were made to phase out A[redacted]'s physical restraints.

10. Each annual IEP formulated for A[redacted] after 1989 continued to identify A[redacted]'s running as a serious priority concern which needed to be addressed as a part of A[redacted]'s educational program. Over the years, a variety of approaches were tried in an effort to address this problem, including intensified language therapy and various related service consultations.

11. In October, 1992, a note was added to A[redacted]'s IEP indicating that henceforth she would be on a tot-link or lap restraint only at the discretion of the teaching assistant, and then only for no more than 30 minutes at a time. This is the first documentation that the contemplated fading procedure was to be attempted.

12. During the 1992-93 school year A[redacted] attended the ASIEP program at the District's East Junior High School. ("East"). In November of 1992 a triennial staffing was held concerning A[redacted]. Participating in this staffing were A[redacted]'s parents; Josie Nerger, A[redacted]'s special education teacher (primary provider); Marcia Braden, ASIEP coordinator; Tracy R. Deskins, speech-language therapist; Bonnie Borns, assistant principal at East and William Bright, social worker. The IEP generated by this staffing lists as one annual goal: "A[redacted] will improve behaviors to include decrease of autistic behaviors." In addition, the IEP explicitly

lists as a short-term objective of this annual goal: "A[redacted] will decrease running behavior at school, home, and community by 90%". The IEP also recognizes that A[redacted] requires supervision and monitoring to "maintain control of running behavior." It also indicates A[redacted] needs to learn "safety in the community," "increase [her] awareness of danger;" and "improve [her] ability to generalize." Community-based instruction, a characteristic of service added the prior year, was continued in this year, reflecting A[redacted]'s adolescent need for pre-vocational activities and implicitly reflecting the growing importance of controlling A[redacted]'s running behavior as she grew older.

13. Each of A[redacted]'s IEPs from at least 1989 to 1992 indicated that A[redacted] would be provided various related services, including for one or more years, speech-language and education and psychological consultation. The November 1992 IEP provides, among other things, for speech-language, psychological-social work, and occupational therapy as related services. However, despite the fact that occupational therapy was listed in A[redacted]'s 1992-93 IEP as both a characteristic of service and a related service, she received almost no occupational therapy services during the 1992-93 school year.

14. A[redacted]'s November 4, 1992 IEP did not specify that control of A[redacted]'s running behavior was her top educational priority or that recreation as a related service was warranted.

15. As of November 1992, the staffing team agreed that A[redacted] had made no progress to date with respect to her running behavior, despite a previous note that fading of physical restraints was to be attempted. As in the past several years, while at school A[redacted] was constantly obsessing (perserverating) on opportunities to run, which itself distracted her from learning. Efforts to deal with her running at school continued to focus, for safety reasons, on control of that running through close one-on-one supervision and physical restraints. In November 1992, the staffing team did note substantial general improvement in A[redacted]'s speech, language, reading, writing, general behavior and cognitive skills.

16. During the fall of 1992, the Colorado Department of Education ("CDE") conducted an investigation concerning Federal Complaint No. 92:506 which had been filed by A[redacted]'s father against the District in July and August 1992. The complaint alleged that the District failed to provide appropriate Extended School Year ("ESY") services on an individualized basis to qualified students with disabilities and failed to provide needed recreation as a related service to qualifying students with disabilities, and specifically requested that special olympics as a related service be provided for A[redacted]. As relevant to this proceeding, CDE's Findings and Recommendations determined that the District had "failed to appropriately consider recreation as an available related service for any student who might require it to benefit

from special education." The District was required by CDE to clarify in writing for its staff the distinction between recreation as a related service and recreation as an extracurricular activity. The District was also ordered by January 15, 1993 to conduct a review of A[redacted]'s IEP to determine whether she had a need for recreation as a related service.

17. Recreation as a related service involves recreational activities which are directly tied to achieving specific goals and objectives as set forth in the child's IEP. This is to be distinguished from extracurricular activities which are non-academic in nature and merely involve pursuit of an activity of personal interest.

18. Shortly after the November 1992 staffing, A[redacted]'s parents proposed to Marcia Braden as a potential solution to A[redacted]'s running problem that the District provide recreation as a related service and particularly special olympics, and requested a staffing on this issue. The parents hoped that this proposed solution would assist A[redacted] to develop adaptive skills to channel her running behavior so as to eliminate her dangerous behavior rather than merely controlling it. Although Braden felt the suggestion was a good one to deal with A[redacted]'s running behavior, the parents were informed by a District special education supervisor that the District did not want to provide the requested service to A[redacted].

19. The staffing team was not immediately reconvened as requested. However, pursuant to CDE's order to the District in connection with Federal Complaint No. 92:506, a staffing was scheduled for January 15, 1993, to consider whether A[redacted] required recreation as a related service.

20. Federal regulations require the presence of the following individuals at an IEP staffing; a representative of the public agency (here, the District) other than the child's teacher; the child's teacher; the child's parent (and the child, if appropriate); and other individuals at the discretion of the parent or agency. 34 C.F.R. §300.344. The state imposes a further requirement that both a special education director or designee and a building administrator or designee be present. State Plan, Pt. II, Section B,V,E.

21. Pursuant to an audit of the District's special education program conducted by CDE and completed in January 1991, the District was informed it was required to have present at staffings both the building administrator or a designee of that administrator and a designee for the director of special education. In response to these CDE requirements, the District, on October 1, 1992, agreed to provide such individuals at staffings, noting that an individual was permitted to serve in the capacity of designee for a total of two required staffing positions and further noting that designees

for the building administrator and the special educational director would be different people.

22. Previous to January 15, 1993, Marcia Braden had always acted as chair and recorder of A[redacted]'s staffings, acting as designee of the District's special education director. In addition, the building's assistant principal had always been present as designee for the principal. This procedure complied with existing regulations, CDE requirements, and the District's October 1, 1992 commitment to CDE regarding future IEP staffings.[3]

23. At A[redacted]'s January 15, 1993 staffing, which was convened to consider A[redacted]'s need for recreation as a related service, Meredith Jobe, a special education supervisor with the District, was sent by the District to participate as designee for the District's Special Education Director, Ronald Hage. Others present at the staffing included George Marin, a special education supervisor and intern to East Junior High's principal, who attended as the principal's designee; Josie Nerger, A[redacted]'s special education teacher; Robert Tinker, a psychologist associated with the ASIEP program; Tracy Deskins, A[redacted]'s speech-language therapist; Marcia Braden, director of the ASIEP program; and A[redacted]'s parents.

24. Of these individuals, Braden, Tinker, A[redacted]'s parents, and her teachers and therapists were part of her traditional core staffing team and were involved on a regular, sustained and consistent basis with A[redacted] and her education. In contrast, Jobe and Marin had never previously participated in a staffing concerning A[redacted] and had little first-hand knowledge of A[redacted] or her educational needs.

25. Prior to attending the January 15, 1993 staffing, Jobe and Marin apparently consulted with Ronald Hage, Director of Special of Education for the District. It was apparently determined at that time, as a matter of District policy, that if the staffing team agreed A[redacted] was receiving benefit from her educational program, the District would refuse to provide recreation as a related service and specifically special olympics.

26. As of January 1993 and continuing until at least the IHO hearing, Hage had virtually no first-hand knowledge of A[redacted] or her educational needs, as indicated by his erroneous testimony that A[redacted]'s running was not considered a serious problem by her staffing team prior to January 1993.

27. Jobe, as newly appointed designee of District Special Education Director Hage, insisted, over the objections of A[redacted]'s parents and other team members, on chairing the January 15, 1993 IEP staffing and acting as its recorder. This situation continued over protests of the parents and the core staffing team throughout the 1992-93 school year. However, Jobe insisted on chairing and

being the recorder only with respect to staffings involving A[redacted]; Braden was permitted to chair and record staffings with respect to all other ASIEP students.

28. Initial discussion at the staffing related to an overview of A[redacted]'s current program status, including her substantial progress in academic areas. The core staffing team, including Braden, Tinker, Nerger, Deskins and A[redacted]'s parents, then expressed their concern that no progress had been made with respect to A[redacted]'s running behavior and stated their agreement that recreation as a related service, and in particular special olympics, was necessary for A[redacted] to benefit from her education with regard to her running behavior. This group of individuals agreed that a regular, structured, consistent, high intensity, motivational program of recreational services was necessary to channel A[redacted]'s running behavior and reduce her obsessive concentration on running during times she is not running. Further, this group expressed agreement that no existing regular or adaptive physical education program was adequate to provide for these needs, but that a program such as special olympics would be adequate as a recreational program. The District representatives, however, took the position that A[redacted] was not entitled to recreation as related service because she was receiving educational benefit from her program.

29. In recording this and other staffings, Jobe failed to note the agreement of the traditional staffing team that recreation as a related service was necessary for A[redacted] to receive benefit with respect to her running, and failed to note the position taken by the District that it would not consider recreation as a related services as long as A[redacted] was receiving any educational benefit.

30. At this staffing, the District, through its two designees, failed to discuss or consider in any fashion A[redacted]'s needs with respect to her running behavior prior to announcing its non-negotiable position that recreation as a related service would not be provided. In fact, Marin testified that he was not even aware at the time of this staffing that recreation as related service was being requested specifically to address A[redacted]'s running behavior.

31. The staffing was adjourned without all individuals present reaching agreement on the issue of recreation as related service.

32. By failing to address A[redacted]'s needs with respect to her running behavior and by failing to give consideration to the possible available options for dealing with that behavior, including recreation as a related service, prior to rejecting one option out of hand, the District failed to act in good faith and prevented the parents from having meaningful input in the IEP staffing process. This is particularly true here where A[redacted]'s current (November 1992) IEP specifically provided for control and

reduction of her running behavior and where the option rejected unilaterally by the District designees had been requested and agreed upon not only by the parents but by all members of the traditional core staffing team -- those who were most familiar with A[redacted] and her current educational needs.

33. Less than one hour after the initial January 15, 1993 staffing ended, the District's Special Education Director, Ronald Hage, caused the staffing to reconvene. No prior written or oral notice to the parents was attempted or given, and having no knowledge of the purported reconvening, they did not attend. Other members of the traditional staffing committee were also not given advance notice of the reconvened staffing and, with the exception of Josie Nerger, who remained in the building where the initial staffing had been held, they did not attend. Braden had been consulted briefly by telephone and objected to the proceedings being held without notice and in the absence of the core team and the parents.

34. At the purported reconvening of the IEP staffing on January 15, 1993, Hage, who was present as a representative of the District's administration along with Jobe and Marin, caused the following statement to be added to the IEP record, above the signatures of the staffing team members who had departed at adjournment and were neither present nor invited to the purported reconvening: "Based on the information shared at this staffing, the staffing team makes the following decisions: 1. Additional related services including recreation and leisure are not required. 2. ESY services are not required." At the time Hage directed this addition to the IEP record, he was well aware that the entire traditional core staffing team, including A[redacted]'s parents, over whose signatures this statement was added, dissented from this statement. Nerger, who was present, also dissented.

35. The District asserts its purported purpose in reconvening the IEP staffing without notice on January 15, 1993, was to come to a final determination regarding recreation as a related service for A[redacted] in compliance with the deadline set by CDE. This argument is unconvincing in light of the fact that Hage at the reconvened meeting also had language added to the IEP asserting A[redacted] was not eligible for extended school year services. This issue, like the issue of related services, was contested by the absent staffing team members; furthermore, there was no need to make a precipitous decision on this matter since it was not covered by CDE's January 15, 1993 deadline concerning recreation as related service.

36. Upon learning of the reconvened unannounced staffing and its results, A[redacted]'s traditional staffing team members wrote letters of protest and dissent to the District and A[redacted]'s parents requested that the staffing be reconvened.

37. The staffing was reconvened on January 27, 1993. This meeting was attended by Marin, Jobe and another designee of the District's administration, as well as the traditional core team. A total of seven members of the staffing team (including A[redacted]'s five direct service providers and her parents) all dissented from the decisions made at the unannounced second staffing on January 15, 1993. The District agreed at this January 27 meeting to delete the language added at the unannounced January 15, 1993 staffing concerning refusal to provide recreation as a related service. This deletion was based solely on the District's tacit acknowledgment of prior procedural irregularities, rather than on any change of heart on the District's part as to the correctness of its position regarding recreation as a related service.

38. The added District administrative presence of Jobe (as chair and recorder) and Marin, among others, as A[redacted]'s staffings, as described above, continued throughout the winter and spring of 1993 for the entire development of the IEP which the parents protest here. Furthermore, the administrators continued to fail to give consideration to the request of the parents and the additional staffing team with respect to A[redacted]'s unique educational needs.

39. For example, at the January 27, 1993 meeting, all of A[redacted]'s direct service providers as well as her parents and guardian *ad litem* unanimously agreed that A[redacted] was not benefiting from her education with respect to her running behavior and that recreation as a related service, specifically special olympics, was necessary for her to benefit. However, the District maintained, on the one hand, that recreation as a related service was not warranted because the traditional team had had so much success educating the student. On the other hand, the District refused to consider to the traditional staffing team's current consensus for treating A[redacted]'s running behavior, because the team's previous approaches in that regard had failed. In fact, however, the actual reason for the District's refusal to consider the staffing team's proposal was its predetermined position that it did not want to provide recreation as a related service, unrelated to A[redacted]'s individual needs and circumstances. In lieu of considering recreation as a related service, the District suggested obtaining an educational consultation from CDE concerning A[redacted]'s running behavior. The parents consented to this proposal not because they agreed with the District's refusal to consider recreation as a related service, but because the District's actions in refusing to consider recreation as a related service had left the parents with little choice.

40. As a result of the January 27, 1993 staffing, the District contacted CDE to obtain a consultant. Because the consultant provided by CDE was unacceptable to the parents (relating to the consultant's prior involvement with ASIEP), eventually an independent consultant, Dr. Lewis Jackson, who had

no prior experience with or exposure to the District, was agreed upon by the parties and hired by the District.

41. During the spring of 1993, Jackson conducted an evaluation of A[redacted]'s overall educational program with special consideration of her running behavior. In connection with this evaluation, Jackson met briefly with A[redacted] and observed her briefly in class. He also spent approximately two hours with A[redacted]'s special education teacher and four hours with A[redacted]'s father. Based on this assessment process, Jackson issued a report in April 1993. Additionally, two occupational therapy ("O.T.") evaluations were performed on A[redacted] during this time period -- one at the initiation of the parents by Karen Selley, O.T.R., and one at the initiation of the District by Joanne Driscoll, O.T.R. Both Selley and Driscoll utilize sensory integrative techniques in connection with their O.T. practices.

42. Jackson's report recommended that A[redacted] be provided with educational experiences which would increase A[redacted]'s engagement in, and appropriate control over, her environment (greater mainstreaming, more choices, more intrinsically interesting activities); and be given the opportunity to engage in physical activities which are routinely available to all junior high students but were not then part of A[redacted]'s school day. He also recommended that A[redacted]'s physical restraints be removed and that responsibility for her safety be dispersed from her one-on-one special education situation to the school community at large. Jackson emphasized the importance of providing A[redacted] with choices among an array of intrinsically motivating activities and the ability to verbalize those choices, as well as increasing A[redacted]'s opportunities for age-appropriate interactions with typical and disabled peers in a variety of settings. Jackson's position was that with support from the special education teacher, this plan would address A[redacted]'s running behavior without requiring special recreational services outside those provided during in the regular school setting. He emphasized that this was an inclusive approach that would be consistent with the principle of least restrictive environment. Jackson described this as a "layered" rather than a "sequential" approach (such as ASIEP) and described the ASIEP program as "outdated".

43. While they differed somewhat in emphasis from each other, both Driscoll and Selley recommended that A[redacted] be provided with a variety of physical activities meaningful to her (Driscoll emphasized occupational therapy activities while Selley emphasized recreational activities), as well as fine motor and calming/focusing activities. Both identified impairments in A[redacted]'s ability to process proprioceptive (muscle and joint), vestibular (balance) and tactile input and indicated that their plans were designed to address A[redacted]'s overall educational functioning by providing needed stimulation in these areas. Selley felt that A[redacted]'s running was related at least in part to her own

attempts to provide needed and missing sensory input in these areas. She indicated her plan would address that running behavior and testified that recreation as related service, although not necessarily special olympics, was necessary to enable A[redacted] to control her running behavior and benefit from her education. Selley indicated that in order to assist A[redacted]'s nervous system in registering, organizing and interpreting environmental information so A[redacted] could perform more functionally (and address her need to run inappropriately), A[redacted] required highly structured, frequent, intensive sensory input through recreation. She recommended evaluation and treatment of A[redacted] be accomplished in conjunction with an occupational therapist knowledgeable in sensory integration techniques. She felt initially the therapist should be involved in treatment three times weekly until the program was well established and the therapist was able to train others who would then supervise A[redacted]'s daily recreational activities. At that point the amount of direct therapy to be provided by the O.T. would decrease. Driscoll, on the other hand (at least as of the IHO hearing), did not see a clear relationship between A[redacted]'s sensory deficits and her running behavior and testified recreation as related service was not necessary to A[redacted] to control her running behavior and receive educational benefit. Nevertheless, in order to address A[redacted]'s sensory deficits, Driscoll felt that A[redacted] should receive monthly (mainly indirect) occupational therapy focusing on in-classroom programming and adaptive physical education to provide consistent and regulated sensory input on a daily basis. Both Selley and Driscoll emphasized the importance of engaging A[redacted] in vestibular and resistive gross motor activities and gross motor activities involving joint compression, including running, jumping, hiking, hopping, biking, swimming, roller skating, weight training, skiing and gymnastics. To be effective, Selley and Driscoll felt the activities chosen needed to be age-appropriate and motivational for A[redacted], with daily input.

44. In conjunction with the reports of Jackson, Driscoll and Selley, subsequent staffings were held on April 26, May 4 and May 11, 1993, during which the team's agenda, in part, was to attempt to address A[redacted]'s running behavior. The District, however, continued to take the position, which it considered non-negotiable, that because A[redacted] was receiving benefit from her education she was not entitled to recreation as a related service, despite her acknowledged lack of progress with respect to her running behavior. The District therefore continued to refuse meaningfully to discuss this option for dealing with A[redacted]'s running.[4]

45. In conjunction with the spring staffings the District, in essence, adopted Jackson's report, taking the position that the suggestions in the report were appropriate to deal with all of A[redacted]'s educational issues, including her running. Jackson's plan for A[redacted] was thus codified in the form of addenda to A[redacted]'s IEP. While A[redacted]'s parents and her direct service providers apparently had second thoughts about some of Jackson's suggestions, they did

not actively oppose implementation of his ideas. They felt, however, his suggestions were insufficient because they believed Jackson's approach would not effectively deal with A[redacted]'s running behavior. They therefore continued to seek implementation of additional measures (recreation as a related service, specifically special olympics) beyond those recommended by Jackson to deal with the running problem. Because the District refused meaningfully to discuss recreation as a related service during these sessions (having made a predetermined unilateral decision) and refused to include recreation as a related service in the IEP addenda, no consensus was reached and each of A[redacted]'s direct service providers and A[redacted]'s parents dissented from IEP addenda developed in April and May 1993. The IEP developed in April and May 1993 (in the form of addenda to the November 1992 IEP), to the extent it failed to provide recreation as a related service, was therefore imposed by the District over the dissent of A[redacted]'s parents and direct service providers.

46. In addition to including entries which implement Jackson's "layered" approach and are consistent with Jackson's concern for greater inclusion and meaningful choice in A[redacted]'s day, the spring 1993 IEP addenda include the following items specifically addressing to A[redacted]'s running:

> (a) The April 22, 1993 addendum lists as A[redacted]'s No. 1 goal: "A[redacted] will improve behaviors to include decrease of autistic behaviors including running behaviors," and includes a short-term goal of decreasing running behavior at school, home and community by 90% by a variety of supervision levels and types;
>
> (b) Needs identified by the team on April 22, 1993 (under "Review of Progress") included: "(2) Provide education-related physical education and recreation opportunities provided to other students of A[redacted]'s age ... (5) increased proprioceptive input, sensory processing and increased physical activity; and (6) increase the number and intensity of chronological age appropriate activities that A[redacted] actively participates in throughout integrated school community";
>
> (c) The May 4 and May 11, 1993 addenda include as short-term objectives: "Will be given a variety of recreational opportunities to reduce running behaviors" and "will respond to recreation activities used as a contingency to reduce running."

(d) The May 11, 1993 addendum includes as a characteristic of service "consultation with regular education and special education staff to facilitate sensory processing and motor skills through integrated activities throughout A[redacted]'s school day. Training of new staff by O.T." The time specified for this was three hours of consultation during the remainder of the 1992-93 school year and one hour per week consultation beginning with the 1993-94 school year.

(e) Also listed in the May 11, 1993 addendum was "adaptive instruction in skills associated with high intensity motor activities" and "provision for high intensity motor activities in a variety of environments."

47. As of November 1992, A[redacted] was tested cognitively within the Low Average Range with an estimated I.Q. of 85, representing a substantial gain over her previous testing. A[redacted]'s adaptive behavior scores, however, indicated she was functioning at a four or five-year old level with the areas of socialization and communication being of particular concern. In addition, A[redacted]'s 1992 annual communication evaluation indicated a moderate to severe receptive language delay and a moderate to profound expressive language delay. As of November 1992 A[redacted] was able to express her basic wants and needs with simple two or three word expressive phrases or longer phrases in structured situations which included prompting.

48. A[redacted]'s strengths in school year 1992-93 included her visual motor response which was measured at slightly over one year above her chronological age. Another of A[redacted]'s strengths is her sheer speed and endurance while running. She is also skilled using shop tools and has displayed mechanical aptitudes. She is learning to operate a computer.

49. A[redacted] gets pleasure from vigorous physical activity, particularly running, and such activity is a very strong intrinsic motivator for A[redacted].

50. In view of A[redacted]'s levels of functioning, a reasonable long-term educational goal and objective for A[redacted] is semi-independent living in a group home or otherwise, a sheltered workshop or other job situation, and the ability to travel on her own to work and leisure activities in the community.

51. As of the time of the IHO hearing all participants in A[redacted]'s staffing team agreed that A[redacted] must gain control of her running in order to meet her long-term educational goal of semi-independent (non-institutional) living. Furthermore, there was

general agreement within the staffing team that as of the IHO hearing A[redacted] had still received no benefit from her education with respect to her running behavior.

52. The need for controlling running behavior grows more acute as A[redacted] gets older. While external control such as tot-links and continuous one-on-one supervision can be reconciled to some extent with a primary school setting, they become less and less acceptable for a junior high school adolescent. A[redacted]'s current needs in terms of socialization, mobility both in school and in the community, her need for community-based instruction and greater independence, and her future need for transition services all point to an ever-growing urgency for finding a way to help A[redacted] master her running internally. There is an unspecified window of opportunity to accomplish this task, after which it will be too late or even more difficult to achieve.

53. Special olympic activities rotate in seasonal cycles, depending on the sport. During any one cycle, the schedule generally requires a student to attend after school weekday practices lasting several hours each week for several weeks, then participate in a one-day regional meet, followed by a weekend-long state meet. Some activities that can be pursued on these seasonal cycles are swimming, track and field, skiing, and horseback riding.

54. Independent of the District, A[redacted] participated in special olympics swimming from April to June, 1993 and attended a weekend special olympics ski trip in early February 1993. Her behavior when involved in special olympics was noticeably less obsessed with running. She showed improvement in her motivation and ability to communicate, and she was clearly eager to pursue the physical activity involved. She was not on a tot-link at any time during special olympics. During an awards banquet which was held in June in a room which was encircled by a running track, A[redacted] did get away twice to try out the running track, but did not leave the room. Apart from this occurrence of only slightly questionable appropriateness, A[redacted] displayed no running behavior during the special olympics.

55. Participation in special olympics, in and of itself and without District support, can reasonably be expected to provide A[redacted] with the following benefits related to her educational objectives:

a. Increased variety of activities of intrinsic motivation for A[redacted] to choose among, and more intense intrinsic motivation from these sports-related activities;

b. Increased age-appropriate interactions with both disabled and atypical peers in a variety of community settings, including dormitory settings on over-nights away from family, to assist in generalizing her learning to other meaningful settings;

c. Age-appropriate involvement in therapeutic vigorous physical activity, vestibular stimulation, heavy proprioceptive input, and sensory motor stimulation.

d. Additional motivator for [redacted] to attend to difficult learning tasks, on the order of, "When you finish you can go to special olympics;" and

e. Structure and dependability of a regular, consistent recreational program.

56. If the District were to provide a trained aide to accompany [redacted] to special olympics practices and events, then it can be reasonably expected that [redacted] would derive the following additional benefits:

a. Trained reinforcement of skills learned in the school setting;

b. Charting of [redacted]'s behaviors for assessment purposes, and for refining her IEP;

c. Enrichment of the "layered" educational program by extending it to community settings incorporating activities of high intrinsic interest to [redacted];

d. Trained assistance in how to make use of the opportunities of the "layered" approach to learn to control running behavior.

57. The District's budget can accommodate paying for a one-on-one aide for [redacted] for a number of hours per week during regular school hours throughout the school year, as was established by the District's offer to pull [redacted] out of her school day, transport her across town to the YMCA for private swimming lessons, and provide an accompanying aide. (The parents reasonably declined this offer on the basis that [redacted] would not have the benefit of socialization with other youth, and would lose out on educational programs scheduled during her school day). By comparison, substituting payment for an aide to accompany [redacted] on the special olympics schedule noted above would not be a significant expense.

58. The District is easily able, with no more than negligible expense, to provide transportation to [redacted] for weekday special olympics practices in town. Transportation to regional and state meets would cause an additional expense to the District.

59. There is no need for the District or the parents to provide for overnight accommodations at the special olympics meets; these and other administrative costs of the program are provided free of charge by the private business sponsors of the program.

60. A[redacted]'s parents are presently both unemployed. This stems partly from the daily demands of protecting A[redacted] from her running behavior (though some respite care is available), partly from advocacy activities and the demands of pursuing litigation to address their daughter's educational needs, and partly from other causes not in evidence. A[redacted]'s parents do not have resources to provide for a trained aide to accompany A[redacted] to special olympics activities. A[redacted]'s father plans actively to seek work soon, and once he obtains employment he plans to use the family car to get and from work.

61. Despite the dissent of A[redacted]'s parents and direct service providers to the April and May, 1993 addenda to A[redacted]'s IEP based on a failure to include recreation as a related service, certain other elements of the addenda were implemented to some extent by general agreement in the spring of 1993. For example, sometime after January 1993, the ASIEP program stopped using a tot-link for A[redacted] when she was in a structured one-on-one setting, although it was sometimes used while A[redacted] was in the community. In addition, during this period of time the ASIEP program became less structured, providing A[redacted] with greater opportunities to interact with her peers and to make and verbalize meaningful choices.

62. As of the IHO hearing, A[redacted]'s traditional core staffing team, consisting of her teacher, teaching assistant, evaluating psychologist, her parents, and the ASIEP program coordinator, all agreed that recreation as a related service is necessary for A[redacted] to derive benefit from her educational program with regard to her running behavior. Her speech-language therapist, Tracy Deskins, agreed with this position as of the January 15, 1993 and January 27, 1993 staffings, but testified to the contrary at hearing. Additionally, O.T.R. Selley agrees with this perspective.

ADDITIONAL FINDINGS OF FACT

Based on the evidence and testimony taken at the state level review hearing, the Administrative Law Judge makes the following Additional Findings of Fact:

63. Shortly before the IHO hearing, the District and the parents entered into an agreement resolving some of the issues which were originally raised by the parents for resolution at the IHO hearing. As a result of this settlement, the District agreed to provide to A[redacted] and did provide during the summer of 1993: (a) Extended School Year ("ESY") services five days per week, three hours per day for six weeks, addressing all skills and objectives identified in A[redacted]'s ESY referral form; and (b) compensatory direct and indirect O.T. totalling 24 hours during the six week

ESY.[5/] In addition, non-compensatory O.T. services were provided to A[redacted] during ESY pursuant to her IEP.

64. In agreeing to provide ESY and compensatory O.T. services to A[redacted] during the summer of 1993, the District did not admit that it had any legal obligation to do so.

65. A[redacted] attended ESY during the summer of 1993 at the District's Buena Vista Junior High in Colorado Springs along with the number of her classmates from the ASIEP program.

66. Various prior staff from the ASIEP program, including Marcia Braden and Josie Nerger, were not involved in the summer program.

67. A[redacted]'s primary teacher for ESY was Fred Bersche who previously had experience teaching emotionally disturbed and learning disabled children, but who previously had not taught autistic children.

68. For most of the ESY session A[redacted]'s class consisted of four middle and high school students who previously had been in the ASIEP program. Classes were held in a self-contained building on the Buena Vista Junior High grounds, consisting of two classrooms (one for A[redacted]'s class and one for a group of primary age ASIEP students) connected by a room equipped for O.T. usage.

69. The adult-student ratio for A[redacted] for the summer program was more favorable than the ratio that existed for her in the ASIEP program during the regular school year. Four adults worked full time in A[redacted]'s class, along with student volunteers. In addition, a separate O.T., Joanne Driscoll, and was present most of the time.

70. A[redacted]'s ESY O.T. program, which in fact exceeded the requirements of the District's settlement with the parents, was very intense and went far beyond Driscoll's original O.T. recommendations for A[redacted]. A[redacted] spent six to nine hours per week receiving occupational therapy services from Driscoll and spend more time in O.T. than in her regular class during the ESY session.

71. A[redacted]'s O.T. program during the 1993 ESY as implemented by Driscoll involved a sensory integrative approach, helping A[redacted] with vestibular and tactile sensory input focusing on visual motor skills and physical activities such as obstacle courses, ball activities, use of playground equipment, walks, turn-taking game playing with other children, and practicing motor skills.

72. The equipment available to the 1993 ASIEP program provided input specifically needed by A[redacted]'s nervous system. A[redacted] thus very much enjoyed using the equipment.

73. During the ESY session Bersche was unaware of and made no effort specifically to implement Jackson's suggestions for a change in A[redacted]'s educational program. In addition, because Bersche was informed the November 1992 IEP, not the April and May 1993 addenda, was the IEP in force, he made to effort to implement the IEP addenda.

74. Despite the fact that Bersche was unaware of Jackson's proposal, the ESY summer session was structured to provide A[redacted] with somewhat greater freedom than she had experienced previously in the ASIEP program, at least as the ASIEP program was structured prior to January 1993. She was not on a tot-link or other restraint at any time, whether in class, on the playground or on walks; was given certain choices with respect to her academic and other activities and an opportunity to voice her wishes with respect to her choices; and was given freedom of movement within her classroom and on the playground. In addition, A[redacted] did all her academic work in the open classroom, in contrast to the individual cubicle often utilized previously in the ASIEP program in an effort to decrease distractions. Bersche designed A[redacted]'s program in this manner based on his understanding of appropriate educational practices.

75. A[redacted] met and exceeded her goals of maintaining her various academic skills during the 1993 ESY session.

76. In contrast to her prior behavior in the ASIEP program, and despite numerous opportunities, A[redacted] did not exhibit substantial running behavior during the 1993 ASIEP summer session. Specifically, A[redacted] never ran or attempted to run away from the building in which her classroom was housed; never ran or attempted to run from the playground or while on walks; and never exhibited perseverative behaviors (such as constantly looking at the door) indicating a desire to run. A[redacted] did, however, get up and run without permission to a favorite swing which was located in the connecting O.T. room.

77. Because the swing was located within the same building as A[redacted]'s classroom and adjacent to the classroom, her "running" behavior did not constitute a safety hazard. However, it is unclear whether this running behavior would have presented a more serious safety threat if the swing in question (or other desired object) had been located across a busy street rather than in the next room. In addition, it is unclear whether the decline in A[redacted]'s perseverative behaviors around running and the fact that she did not run during walks or when in the playground was in any way related to the greater freedom A[redacted] was afforded, or whether it was attributable to the greater number of adults present in her environment, the unprecedented intensity of her O.T. program which may have satisfied her need to run, or whether it was the result of some other factor.

78. For the current school year (1993-94) A[redacted] is again attending the District's East Junior High. Her primary (special education) teacher is Cynthia Sperra who has some previous special education teaching experience but has never previously taught children with a primary handicapping condition of autism.

79. A[redacted]'s special education class consists of four children, Sperra and two adult aides. In addition to her special education class, A[redacted] attends mainstream family room, English, and an activity period with an aide. She also attends (with another special education student) a mainstream music class without an aide.

80. A[redacted]'s special education class at East, like her summer program, is structured to provide her with somewhat greater freedom than she had previously experienced in the ASIEP program, as the program was structured prior to January 1993. She is not on a tot-link or seat restraint at any time. In addition, she is permitted to move from class to class during passing periods with other students without any physical restraint or hand-holding, although an adult does stay near her and/or observe her closely while she is in the halls or outside. A[redacted] walks across the hall from her special education room to her mainstream music room accompanied only by another special education student. Previously, all movement between classrooms was much more closely supervised than this. Further, A[redacted] is given the opportunity to make and verbalize choices about her academic activities and is given greater freedom of movement within her special education classroom than was the case previously, especially prior to January 1993.

81. A[redacted] has the following recreational/gross motor opportunities as part of her school program this fall. She has a regularly scheduled unstructured outdoor time (recess) when she has the option to do such things as take walks or jog. Further, in connection with her activity period, two days a week A[redacted] has enthusiastically participated in a period of regular education intramural track which utilizes the outdoor track in good weather.[6] In addition to running, the track program includes some amount of stretching activities and working with weights, thus involving some resistive activities. Along with her classmates, she also participates (apparently one period per week) in marching with the school band. No other recreational activities are currently in place for A[redacted] at this time. Some discussion has occurred between the occupational therapist and Sperra concerning recreational programs for the class as a whole (but not A[redacted] individually), during bad weather and winter months. No actual plan or program existed for such activities at the time of the state level review hearing.

82. During the current term A[redacted] is no longer receiving the intense compensatory occupational therapy services she received during the summer. A[redacted] has been receiving indirect O.T. service,

initially from Joanne Driscoll and currently from another O.T. on a one time per month basis, mainly in the form of consultations with A[redacted]'s special education teacher and track coach. East has none of the special indoor O.T. equipment that was available this summer at Buena Vista and no outdoor playground equipment. While the exact equipment used this summer for A[redacted] is not necessary for a successful O.T. program, and other equipment (*e.g.*, swings) could be installed inside the gym or made available outdoors by having A[redacted] and/or her whole class go to a nearby elementary school during recess, neither of these actions had been taken as of the date of the state level review hearing. As of the state level review hearing Driscoll continued to recommend that O.T. should be integrated into A[redacted]'s regular school day and that A[redacted]'s sensory integrative needs be addressed on a gross motor level by providing various sports activities (with O.T. input) during the school day, such as track, swimming, horseback riding and walking.

83. During the current term A[redacted] is receiving direct therapy from a speech-language therapist 50-60 minutes per week.[7] In addition, the speech-language therapist is also providing an unspecified amount of indirect services to A[redacted].

84. In accordance with the District's interpretation of its legal obligations, A[redacted]'s current special education teacher is attempting to implement her November 1992 IEP and not the agreed-upon parts of the April and May, 1993 IEP addenda. However, Sperra also indicates that she agrees with Jackson's recommendations and is attempting to implement incrementally all aspects of Jackson's program. Sperra takes the position that she is doing so because these suggestions make sense, not because they are part of any IEP which is actually in effect.

85. As of the state level review hearing, some, but not all, of Jackson's recommendations had been implemented. Specifically, Sperra has made an effort to provide physical activities (marching band, walks, track); choices for A[redacted] and opportunities for A[redacted] to verbalize her choices; and interesting and functional activities (computer activities and mainstream classes).[8] Other recommendations of Jackson, including developing peer relationships and a plan for peer support ("circle of friends") and providing travel skills and peer relationships as a package, had not been implemented by the time of the state level hearing, but were in the planning process.

86. During the fall of 1993, A[redacted] has on two occasions gone to areas of the school building (last year's classroom, looking for a friend; last year's special ed bathroom, now a boys' bathroom) where she was not supposed to be. However, she was retrieved quickly and without resistance in each case. Apart from these (ambiguous) incidents, A[redacted] has not exhibited running behavior or attempted running behavior while in school or on school grounds, despite numerous opportunities to do so (moving around her

classroom, moving between classrooms, music class, outside walks, band, intramural track). In addition, A[redacted] has exhibited no preservative behavior at school around the issue of running; there has been no looking for escape routes or running opportunities. This represents a significant improvement with respect to A[redacted]'s running behavior at school compared to her behavior prior to the summer of 1993.

87. As of the date of the state level review hearing (approximately five weeks into the 1993-94 school year), A[redacted] had not yet been taken into the community as part of her community-based education program as specified in her 1992 IEP. It is therefore impossible to determine at this stage whether A[redacted]'s running behavior will be a problem this year in connection with this aspect of A[redacted]'s IEP.

88. There is no evidence that A[redacted]'s running behavior at school is currently interfering with the remainder of her academic program to the extent currently implemented. However, because A[redacted]'s entire educational program as set forth in her IEP has not been implemented yet (*e.g.*, community-based instruction had not yet begun as of the time of the hearing), it is not possible to predict what, if any, impact A[redacted]'s running behavior will have on her entire educational program. Furthermore, because the fall term was in its early stages as of the state level hearing, it is difficult to predict whether A[redacted]'s apparent behavior changes at school will persist.

89. Since the IHO hearing, A[redacted]'s running behavior outside of school has not abated at all. She has run away from home or attempted to do so on numerous occasions (20-30 times, including being picked up by the police several miles from home on three occasions, one of these times late at night in an unsafe environment); has run from her adult sister's home on more than one occasion; and has attempted to run from respite care.

90. A[redacted] has never gone somewhere appropriate outside her home on her own (*e.g.*, to a local convenience store to make a purchase) and then returned voluntarily on her own.

91. As of the time of the state level hearing A[redacted]'s running behavior outside of school continued to present a significant safety hazard to her and continued to present a serious obstacle to an otherwise realistic long-term educational goal of having A[redacted] eventually function in a semi-independent, non-institutional assisted living environment.[9]

92. Lewis Jackson is currently acting as a technical consultant to District 11 with regard to the ASIEP program as a whole. Jackson consults with teachers on an occasional basis but is not a program designer.

93. Jackson continues to agree that A[redacted] needs a recreational component to her regular school day.

94. A common characteristic of autistic children is that they have great difficulty generalizing learning from one environment to another. Thus, an autistic child may be able to accomplish a task in a school setting but will have difficulty performing the same or a similar task in a work setting or at home. As a result, one significant portion of A[redacted]'s educational program has been community-based education in order to permit A[redacted] to practice various skills (*e.g.*, handling and counting money, purchasing items, etc.) in different settings, including settings where A[redacted] will ultimately have to use the skill in question. By the same token, any advances A[redacted] makes in curtailing her running behavior at school must be practiced in a variety of other (community) settings to assist A[redacted] in generalizing her new-found abilities in this regard.

95. At 15, A[redacted] is now one year from the age at which the District is required to develop a transition plan aimed at allowing A[redacted] ultimately successfully to move from her school environment.

96. Jackson believes that if his plan for A[redacted] is implemented in full and if A[redacted] is successful in curbing her running at school but continues to run in non-school settings (which behavior would jeopardize the ultimate goal of A[redacted] functioning in some kind of semi-independent living setting), the District has an obligation to reconvene the IEP team and to work with A[redacted]'s parents to develop a plan to deal with this problem and to help A[redacted] generalize her gains at school to other environments.

97. A[redacted]'s current program offers her greater flexibility and freedom of movement and choice and more opportunities to verbalize her wishes than was the case with her ASIEP program, at least prior to January 1993. This greater freedom has provided A[redacted] with greater opportunities to exercise more appropriate control over her environment. In theory, according to Jackson, this ability to control her environment and express her wishes, when combined with other aspects of Jackson's program, will decrease A[redacted]'s motivation to run and the incidents of running. It is impossible to determine at this point whether the program ultimately will be successful.

98. In view of the appropriate ultimate future goal for A[redacted] of semi-independent living and growth of responsibility without running, the District must address A[redacted]'s running behavior both in school and in other environments, even in the event A[redacted]'s running behavior in the school environment continues to fade.

99. Marcia Braden and Lewis Jackson differ as to the root cause of A[redacted]'s running and therefore differ as to the appropriate

approach to stop that running. While Jackson indicates A[redacted]'s running stems, in part, from sensory causes, his program focuses largely on a different component. Jackson believes that to a great extent A[redacted]'s running is motivational, in that she often has a target destination (the swing, the swimming pool, the 7-11). He therefore has concluded that providing A[redacted] with more meaningful control over her environment and greater opportunities to verbalize her wishes will, along with other aspects of his program, control her running behavior. Braden, on the other hand, believes that while the place to which A[redacted] runs is determined by her motivation, the underlying reason she runs relates to unmet needs in her sensory system which are met by the act of running itself. Braden, A[redacted]'s parents, and A[redacted]'s direct service providers from the 1992-93 school year (except Deskins, and Driscoll who became a direct service provider in the summer of 1993) continue to believe that A[redacted] requires a consistent, structured, high intensity, motivational recreational program such as special olympics to address and channel these sensory needs, and that such a program must be outside the regular school day to enable A[redacted] to generalize this channeling of her behavior to a variety of environments other than school. Braden believes that the recreational opportunities being provided to A[redacted] in the current school year satisfy none of these requirements. While Jackson acknowledges a causal sensory component to A[redacted]'s running, his program, in fact, focuses minimal attention on this issue and focuses instead on meaningful choices, methods of inclusion, and skill development from interaction with typical peers. Jackson relies upon Driscoll's assurance that her O.T. recommendations will address A[redacted]'s sensory needs, but acknowledges he has no expertise in the field of sensory integration. Thus, Jackson's general recommendations with respect to providing A[redacted] with in-school recreational activities are not specifically intended to address A[redacted]'s sensory needs, but instead may best be seen as an additional facet of Jackson's inclusion/meaningful choices model.

100. Although individuals differed as to whether A[redacted]'s sensory deficits cause her running, there was no real dispute (from those who addressed this issue) that A[redacted] needs specialized services (whether denominated as O.T. or recreation) focused on sensory integrative techniques to address her sensory deficits in order to "provide the appropriate sensory input and motor development that [A[redacted]] needs to continue to improve in her overall daily functioning and ability to learn." (Driscoll Evaluation of A[redacted], 4/16/93). Such services must be provided on a controlled, consistent and regulated basis to address gross and fine motor needs and calming/focusing activities. In a gross motor area, activities to be included in such programming should provide opportunities for heavy proprioceptive input such as use of a resistive stationary bicycle and adaptive PE (or possibly regular PE with additional therapist support) with input of joint compression such as jumping, hopping, running, karate and martial arts. In addition, A[redacted] needs consistent vestibular input through such appropriate motor activities as scooter board, swinging,

roller skating, swimming and tumbling. Such services should provide highly structured, frequent, controlled and intensive sensory input. After an initial period of intensive direct therapy (such as was provided during the summer of 1993), therapy may be provided on a less frequent (eventually monthly), indirect consultative basis. However, participation by A[redacted] in the activities should be frequent (daily) and by means of age-appropriate activities which are motivational to A[redacted].

101. The sensory integrative program relating to gross motor activities in which A[redacted] was participating in the fall of 1993 does not comply with the requirements set forth above and that it is not sufficiently frequent, structured, controlled or adequately planned to address all of A[redacted]'s proprioceptive and vestibular sensory deficits.[10]

102. The District does not define its current recreation plan for A[redacted] as recreation as related service. However, the gross motor and physical activities which appear in A[redacted]'s spring 1993 IEP addenda and which were described by Driscoll as being necessary to address A[redacted]'s sensory deficits and were described by Jackson as being part of his overall plan for A[redacted] appear to fall within the category of recreation as related service because the activities in question are recreational in nature and were specifically related by Driscoll and Jackson (as well as Selley) to A[redacted]'s education objectives, *e.g.*, addressing her sensory deficits and/or providing appropriate channels for her desire to run. Nevertheless, whether such activities are properly characterized as occupational therapy, recreation as a related service or under some other label is ultimately less significant than identifying A[redacted]'s need for such services.

103. Jackson and his professional colleagues actively advocate in opposition to school districts providing special olympics to disabled students as a related service. A[redacted]'s parents belong to a parent support group (United Parents) which has advocated that the District provide special olympics to disabled children with demonstrated need.

104. No witness testified that special olympics was the only recreational service that could meet A[redacted]'s needs with respect to her running. The testimony in support of special olympics was that it was a congruent match with A[redacted]'s educational objectives, a dependable and established program already in place, and one that would be relatively inexpensive and uncomplicated to incorporate in A[redacted]'s IEP. Those that support special olympics view it as one way of meeting A[redacted]'s need for recreation as a related service to control her running.

105. The District's policy is to refuse to list recreation as a related service for any student who is deriving any benefit whatsoever, in any educational area, from the student's IEP.

Should recreation as a related service ever be included in a student's IEP, it is District policy that it be restricted to a classroom whenever possible. It is also District policy not to set a precedent of providing special olympics as a related service.

106. There is a good faith dispute among the expert consultants and direct service providers with regard to A[redacted]'s need for recreation as related service to control her running behavior. Although both approaches claim a theoretical basis, the evidence does not indicate that there is any research which would specifically support either Jackson's approach or the recreation as related service/special olympics approach to controlling A[redacted]'s running. Further, there appears to be a dispute among experts as to whether Jackson's inclusional approach is effective when dealing with autistic children.

107. Although the experts are not in agreement as to the appropriate approach to control A[redacted]'s running behavior, the proposal to do so by providing special olympics as a related service is a reasonable one supported by reasonable and credible individuals. However, the proposal to address A[redacted]'s running through Jackson's model is also a reasonable and credible position, and appears reasonably calculated to provide A[redacted] with benefit with respect to her running behavior. Thus, although the IHO found that as of the time of her hearing A[redacted] needed recreation as related service to control her running behavior, the Administrative Law Judge finds the parents failed to meet their burden of establishing that as of the state review hearing A[redacted] needs recreation as related service and specifically special olympics to control her running .

108. The District did not give reasoned and unbiased consideration to the recommendations of the staffing team and A[redacted]'s parents with regard to recreation as related service but, instead, had a predetermined outcome in mind and foreclosed meaningful discussion and consideration of this issue based on factors unrelated to the special educational needs of the child. In reaching this determination the Administrative Law Judge has considered the following factors, among others: (a) an ongoing history of District animosity toward the parents and their parent-advocate; (b) a preexisting District ideological determination unrelated to the needs of A[redacted] not to offer recreation as a related service, and, in particular special olympics; (c) the District's insistence on treating A[redacted]'s staffings differently from other staffings; (d) the failure on the part of at least two District administrators participating in A[redacted]'s staffings (as demonstrated at the IHO hearing) to inform themselves of A[redacted]'s November 1992 IEP goals and objectives with respect to running and the reason why recreation as related service was being requested; and (e) the District's apparently inconsistent approach to providing recreation as related service as opposed to other related services.

109. The parties have stipulated, and a review of the record below confirms, that they were afforded due process in connection with the IHO hearing.

DISCUSSION

I. Conclusions and Discussion of Impartial Hearing Officer

A. The IHO concluded that the District violated the procedural safeguards of the Act by keeping inadequate records of the staffing meetings, failing to provide written notice to the parents of the reconvened staffing on January 15, 1993, and inappropriately indicating that decisions made at the reconvened staffing were team decisions. However, the IHO found these violations were *de minimus* and did not result in the denial of free appropriate public education. The IHO determined the inadequate staffing record affected only witness credibility and further found that the other violations were cured when the results of the reconvened January 15, 1993 staffing were vacated.

B. The parents also argued that the District violated the Act and failed to provide a free appropriate public education because the District consistently disrupted the existing consensus of the traditional staffing team concerning recreation as related service. While the IHO found that the District did disrupt consensus, she concluded such action was not prohibited by the Act and did not constitute a failure to provide free appropriate education.

C. The IHO further found that A[redacted] requires recreation as related service to address her running behavior because such running jeopardizes her safety and threatens her ability to derive benefit from her educational generally in terms of achieving her long-term educational objective of semi-independent adult living. The IHO determined that such recreation must be regular, structured, consistent, high intensity, motivational and tied directly to the specific objective of controlling running behavior.

D. The IHO concluded that the question of what specific type of recreation program is required (special olympics or some other plan) is a matter of methodological choice generally left to the District to decide. The IHO therefore declined to order that special olympics as a specific method be offered by the District to satisfy the recreational program requirement. However, in an attempt to provide some closure to the proceeding, the IHO entered a contingency order, requiring that special olympics be provided by the District under specified terms if A[redacted]'s running behavior had not decreased by 50% by January 15, 1994 and by an additional 50% each six month period thereafter.[11]

E. The IHO further determined that because the District failed to provide A[redacted] with recreation as a related service from January 15, 1993 until the IHO hearing date, A[redacted] was entitled to compensatory education in the form of one cycle of special olympics.[12]

F. On the basis of these findings and conclusions, the IHO ordered the District to provide recreation as related service to address A[redacted]'s running behavior in whatever form the District selected, as long as such recreational services were regular, structured, consistent, high intensity and coincided with the layered methodology of A[redacted]'s current IEP. In addition, the IHO entered a contingency order as indicated above and an order for compensatory special olympics.

II. Statutory and Regulatory Background

IDEA requires that a state, such as Colorado, receiving federal grants under the Act must provide each child with a disability with a free appropriate public education ("FAPE"), 20 U.S.C. Sections 1401 *et seq.*, tailored to the unique needs of the child through the establishment of an individualized educational program for such child. 20 U.S.C. Section 1401(20).

The Act expressly defines "free appropriate public education" as "special education and related services" which are provided at public expense and under public supervision, meet state standards and comply with the child's IEP. 20 U.S.C. Section 1401(18); *J.S.K. v. Hendry County School Board*, 941 F.2d. 1563 (11th Cir. 1991). Special education means "specially designed instruction, at no cost to parents or guardians, to meet the unique needs of a child with a disability", including instruction in classrooms and other settings and physical education instruction. 20 U.S.C. Section 1401(16). Related services include recreation as may be required to assist a child with a disability to benefit from special education. 20 U.S.C. Section 1401(17).

The Act provides each child with a disability with a basic floor of educational opportunity, *Rowley, supra*; *Board of Education of East Windsor Regional School District v. Diamond*, 808 F.2d 987 (3rd Cir. 1986); *Drew P. v. Clarke County School District*, 877 F.2d 927 (11th Cir. 1989). A state provides this basic floor of opportunity and satisfies the minimum requirements of the Act by providing a child with a disability with (1) access to specialized instruction and related services; (2) which are individually designed; (3) to provide educational benefit to the student. *Rowley, supra*, at 201; *Drew P. v. Clarke County School District, supra*; *Jefferson County Board of Education v. Breen*, 853 F.2d 853 (11th Cir, 1989). As established by *Rowley*, the requirements of the Act are satisfied and a FAPE is provided if, first, the state educational agency complies with the procedures of the Act and, second, the IEP developed pursuant to these procedures is reasonably calculated to enable the child to receive educational benefits. *Cain v. Yukon Public Schools, District I-27*, 775 F.2d 15 (10th Cir. 1985), *Burke County Board of Education v. Denton*, 895 F.2d 973 (4th Cir. 1990).

Although no particular form of education is mandated by the Act, *Rowley, supra*, at 200, and the school district is not required to maximize educational opportunities or provide the best possible education, Rowley, *supra*, at 198-200; *Cain v. Yukon Public Schools, District I-27, supra; Burke County Board of Education v. Denton, supra,* it is also true that the school district must provide a program calculated to provide more than a trivial educational benefit to the child. *Hall by Hall v. Vance County Board of Education*, 774 F.2d 629 (4th Cir. 1985); *Board of Education of East Windsor Regional School District v. Diamond, supra; Polk v. Central Susquehanna Intermediate Unit 16*, 853 F.2d 171 (3rd Cir. 1988) ("Polk").

Under the two-step *Rowley* inquiry involved in determining whether a FAPE has been provided, the first inquiry is whether the state has complied with the procedural requirements of the Act. The Administrative Law Judge thus deals first with the parent's argument that the District's procedural violations constituted the denial of a FAPE.

III. Procedural Issues

The Act and its implementing regulations establish procedures for the development of the child's IEP through a staffing process which involves a representative of the local education agency; the child's teacher, the parents (and child, if appropriate); and other individuals at the discretion of the parents or public agency. 20 U.S.C. Section 1401(a)(20); 34 C.F.R. §§300.343 -.345. Courts interpreting the IDEA have repeatedly emphasized the significance of the processes established by the Act and the procedural safeguards of the Act. See *e.g.*, *Doe v. Defendant I*, 898 F.2d 1186 (6th Cir. 1990); *Hall by Hall v. Vance County Board of Education, supra; Roland M. v. Concord School Committee*, 910 F.2d 983 (1st Cir. 1990), cert. den. 111 S.Ct. 1122 (1991).

The *Rowley* court emphasized that the procedural aspects of the Act, particularly those guaranteeing parental participation at every stage, are at least as significant as the Act's substantive provisions. The Court stated:

> [W]e think that the importance Congress attached to [the Act's] procedural safeguards cannot be gainsaid. It seems to us no exaggeration to say that Congress placed every bit as much emphasis upon compliance with

> procedures giving parents and guardians a large measure of participation at every stage of the administrative process . . . as it did upon the measurement of the resulting IEP against the substantive standard. We think that the Congressional emphasis upon full participation of concerned parties throughout the development of the IEP . . . demonstrates the legislative conviction that adequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP. 458 U.S. at 205.

The federal regulations implementing IDEA similarly focus on procedural safeguards and parental participation in development of the IEP. See, 34 C.F.R. §300.343 (requirement of meetings to develop, review and revise IEPs); §§300.344 and 300.345 (specifying that the public agency shall insure that parents and others attend IEP meetings); and 34 C.F.R. Pt. 300, App. C, I (an interpretation of IEP requirements under the Act indicating that at IEP meetings parents and school personnel "as equal participants . . . jointly decide what the child's needs are, what services will be provided to meet those needs, and what the anticipated outcomes may be").

Thus, where procedural violations are found to be serious, courts will determine that the child has been denied an appropriate education independent of any substantive violations of the Act. *Hall by Hall v. Vance County Board of Education*, *supra*.

In the present case, the parents assert that various procedural violations which occurred between November 1992 and May 1993, taken together, constitute a significant, serious and substantial deprivation of the rights of A[redacted] and her parents under the Act amounting the denial of a FAPE. The Administrative Law Judge agrees.

The evidence established that the following procedural irregularities occurred:

1. The parents were given no notice, written or otherwise, or opportunity to attend the reconvened IEP staffing on January 15, 1993. Such notice and opportunity were required by 34 C.F.R. §300.345. The District's argument that it was merely formalizing within the time limits set by CDE a prior decision reached by the team is unconvincing as a matter of fact in light of the manner in which the report of the staffing was drafted; the fact the decision at the reconvened meeting went beyond the scope of the CDE order; and the fact that no effort was made to contact most of those who participated in the earlier staffing. Furthermore, regardless of

the District's rationale, its actions were not in compliance with clear regulatory requirements.

2. Other individuals who were appropriately in attendance at the initial staffing on January 15, 1993, and agreed with the parents' point of view were also not notified by the District of or given an opportunity to attend the reconvened staffing on January 15, 1993. Such action, under the circumstances, constituted a denial of the parents' right to have other individuals present, at their discretion, at the reconvened meeting, in violation of 34 C.F.R. §300.344.

3. At the reconvened January 15, 1993 staffing the District dictated a "decision" into the IEP record that recreation as related service would not be provided and falsely inserted that statement as a purported team decision over the signatures of team members who were not present at the reconvened meeting when the purported team decision was made and who were known to dissent from that decision. Such action constituted a failure to keep accurate records of the staffing, in violation of the State Plan, Part II, Section V, E, 2,(f),(9).

4. Between January 1993 through May 1993 the District on one or more occasions failed accurately to note the reasons for dissenting opinions from various staff members or what those members were recommending. Because the records were incomplete in this regard they are misleading and failed to comply with the requirement for accurate record keeping found in the State Plan, Part II, Section V,E,2,f,(9).

5. Furthermore, the evidence indicates these procedural inadequacies were not merely the result of inadvertent omissions or errors on the part of the District. For example, the evidence indicated that no effort of any kind was made prior to reconvening the January 15, 1993 staffing to contact the parents. Further, although Jobe and Marin apparently began attending other ASIEP staffings at approximately the time they started attending A[redacted]'s staffings, it was only in A[redacted]'s staffings that Jobe insisting on usurping Braden's traditional role as chair and recorder of the staffings. Jobe then proceeded to omit details as to the nature of the dissents of the traditional staffing team to the positions taken by District administrators.

6. Most significant of all, at no time did the District ever meaningfully consider the position of the parents and the traditional staffing team that A[redacted] needed recreation as related service and specifically special olympics. In this case, A[redacted]'s parents and traditional staffing team proposed recreation as related service (special olympics) as a means of dealing with a significant need identified by the staffing team and listed in A[redacted]'s November 1992 IEP -- the need to reduce A[redacted]'s running behavior at school, at home and in the community. By

predetermining not to offer [redacted] recreation as related service for reasons unrelated to [redacted]'s individual needs, and by refusing to consider this proposal of the parents and the staffing team to deal with [redacted]'s unique and substantial need as recognized and defined in her individualized education program, the District effectively prevented the parents from meaningfully participating in the staffing process. Such actions violated the Act and its implementing regulations. *Spielberg v. Henrico County Public Schools*, 853 F.2d 256 (4th Cir. 1988), cert. den. 486 U.S. 1016 (1989); *Polk, supra*.

The District has a substantive obligation to address the unique needs of each individual child and to provide in the IEP all the specific special education and related services needed by the child, 34 C.F.R. Pt. 300, App. C. Question 44 (see Discussion Part IV., *infra*). Furthermore, a child's needs for special education and related services are to be determined at a staffing, 20 U.S.C. Section 1401(a)(20); 34 C.F.R.§§300.343 and .346; State Plan, Part II, Section V,E,2,f,(3) and (10), where the parents are to be given a full and equal role with the district in determining the child's needs and the services to be provided. 34 C.F.R. Pt. 300, App. C, I. Moreover, parents must be given the opportunity to be active participants in all major decisions affecting the education of their children, 34 C.F.R. Pt. 300, App. C., Question 55; *Doe by Doe v. Defendant I, supra* (must be adequate parental involvement in formulating IEP).

The District argues it was not required to consider this proposal because [redacted] was receiving educational benefits in other areas and therefore was not entitled to this related service as a matter of law. The District therefore asserts it was entitled to make a unilateral decision, without any meaningful discussion of [redacted]'s actual unique needs, that the requested service would not be provided. Such a position cannot be justified under the Act, either substantively (see Discussion Part IV, *infra*) or procedurally.

The effect of the District's unilateral decision on January 15, 1993 was to prevent any meaningful participation by the parents in IEP decision-making, as well as to prevent any discussion of [redacted]'s running behavior and the potential effectiveness of, and need for, recreation as related service to deal with that running behavior. Furthermore, the reconvening of the staffing on January 27, 1993, and the parents' subsequent acquiescence to the hiring of an outside expert did not vitiate the statutory violations since the District at all times affirmatively chose to ignore the position of the parents (and the traditional staffing group). In agreeing to hire the consultant the District merely stated it would go along with whatever the expert recommended; it never agreed to and, in fact, never did consider the position and arguments of the parents and the traditional staffing team with respect to the services that [redacted] needed to address her identified and serious running behavior. Thus, in view of the District's unilateral initial decision, the reconvening of the staffing and the hiring of Dr. Jackson was not an adequate substitute for giving meaningful consideration in the first instance to the position of the parents and the staffing team.

Moreover, the District's actions had a significant impact here. Where a District's procedural violations compromise the student's right to an appropriate education, seriously hamper the parents' opportunity to participate in the IEP formulation process, or cause a deprivation of educational benefits, the result is the denial of a FAPE. *Burke County Board of Education v. Denton, supra; Roland M. v. Concord School Committee, supra.* Here, the actions of the District effectively eliminated the parents' right to participate jointly and meaningfully in deciding A[redacted]'s needs with respect to special education and related services to deal with the her running behavior, and therefore may have resulted in A[redacted] being deprived of the educational benefits sought by her parents and the staffing team. This is particularly true under the circumstances of this case where the opinion of the parents which the District refused to give any meaningful consideration to was also the opinion of the teachers and experts who knew A[redacted] best. *Taylor v. Board of Education*, 649 F.Supp. 1253 (N.D. N.Y. 1986).

The Administrative Law Judge therefore concludes that taken as a whole the District's procedural violations as outlined above were not *de minimus* but instead potentially compromised A[redacted]'s right to an appropriate education which would address her running behavior; hampered her parents' opportunity to participate meaningfully in the formulation of A[redacted]'s IEP; and potentially caused a deprivation of educational benefits by eliminating the possibility of A[redacted] receiving recreation as related service and, in particular, special olympics to address her running behavior. Taken as a whole, the District's procedural violations of the Act constituted a failure on the part of the District to provide A[redacted] with a FAPE.

In reaching this conclusion, the Administrative Law Judge has focused particularly on the District's actions which denied the parents meaningful participation and somewhat less on the issue of "disrupting consensus" on which the IHO and the parties have focused. The Administrative Law Judge has done so because the term "disrupting consensus" has not been precisely defined. To the extent that it is intended to mean merely that District administrators disagreed with the rest of the staffing team about related services, the Administrative Law Judge is not persuaded by the parents' position. Thus, the Administrative Law Judge is not convinced that the District is prohibited under the Act from disagreeing for legitimate educational reasons with the parents over an educational issue such as related services even where the parents have the support of the child's teachers and the child's direct service providers, at least where appropriate procedures have been scrupulously followed, and the individual needs of the child as well as the opinions of the parents and direct service providers have been thoroughly considered.

Although staffing decisions are to be reached if at all possible by a consensus, where consensus is not reached, the school district has the duty to formulate the student's IEP to the best of its ability. *Doe v. Maher*, 793 F.2d 1470 (9th Cir. 1986). As noted by the District, this view is consistent with federal law and regulations requiring district administrators to participate in staffings, 20 U.S.C. Section 1401(20); 34 C.F.R. §300.344, and state requirements which indicate procedures to be followed when consensus cannot be reached in an IEP staffing. In such circumstances, the majority and minority opinions of the participants are to be recorded as part of the IEP and provided to the director of special education who makes the final decision. 1 CCR 301-8, 4.04(10)(c); District's Comprehensive Plan, Section IV.D.10.[13] Under this analysis, the presence and participation at A[redacted]'s staffings of Jobe or Marin or another administrative designee was required by statute and regulation and the presence and participation of both individuals together was also permissible. Further, controlling statutes and regulations did not require Jobe and Marin to agree with A[redacted]'s parents and the remainder of the staffing team.

The issue is therefore not so much administrative presence or disagreement at the staffings, as it is the District's failure to listen to and consider in good faith the wishes of the parents and the staffing team; its failure to give consideration to A[redacted]'s individual needs; and its failure to allow meaningful participation by the parents and staffing team on the issue of recreation as related service because the District had already reached a predetermined decision on this issue.[14] Thus, to the extent the term "disruption of consensus" is intended to focus not on the District's failure to agree with the staffing team, but on the District's failure to give good faith consideration to the opinions of the parents and the staffing team and its failure to allow meaningful participation by them in staffing decisions relating to recreation as related service, the Administrative Law Judge concludes that the District's disruption of consensus, in combination with other procedural irregularities described above, resulted in the denial of a FAPE for A[redacted].

IV. Substantive Issues

Having resolved the procedural questions raised by the parents, the Administrative Law Judge addresses the substantive issues raised by the District. The District argues, first, that because A[redacted] is receiving benefit from her education, as a matter of law she is not entitled to recreation as related service to address her running behavior. A[redacted] argues that because IDEA requires districts to provide specially designed instruction and related services to address all of the child's disabling conditions and unique educational needs, *Russell by Russell v. Jefferson School District*, 609 F.Supp. 605 (N.D. Cal 1985), the District must meaningfully address A[redacted]'s running behavior despite her acknowledged substantial academic progress in other areas. A[redacted] further argues that the way to meaningfully address that running behavior is to provide recreation as related service and particularly special olympics.

A. District's Obligations to Address A[redacted]'s Running and to Consider her Need for Related Services. The IDEA provides that each disabled child is to be provided with special education and related services which are individually tailored to meet the child's unique educational needs. 20 U.S.C. Section 1400(c), 1401(a)(16),(17),(18),(20), Section 1412(2), 1414(a)(5), 34 C.F.R. §300.1, 300.340-350. Related services, including recreation as related service, which must be provided are those "required to assist the handicapped child to benefit from special education". 34 C.F.R. §300.13.

The District argues that because it is undisputed that A[redacted] is receiving benefit from her education, she is not entitled to receive recreation as related service because such services are not necessary to assist her to "benefit" from her educational program. In so arguing, the District relies on *Rowley* for the proposition that in determining whether a child has received educational "benefit" under the Act, courts need only assess whether the child has received some educational benefit. The District relies on language in *Rowley* and other cases indicating school districts need only provide a basic floor of opportunity and need not provide the best program or the choice of the parents or certain selected experts. *G.D. v. Westmoreland School District*, 930 F.2d 942 (1st Cir. 1991). Thus, according to the District, because A[redacted] has clearly received educational benefit as defined by *Rowley* from her special education program provided by the District, related services (including recreation) are obviously not "required" to assist her in benefiting from her special education. In fact, the District asserts in light of the fact that A[redacted] is receiving benefit, it is under no legal obligation to address her running behavior at all.

The Administrative Law Judge disagrees with the District's very narrow reading of the Act and concludes that the relied upon language in *Rowley*, because the court was not addressing the specific point raised in this case, is not directly applicable here. The IDEA and its implementing regulations go beyond merely stating that disabled children are entitled to IEPs designed to provide some educational benefit. The Act stresses the need for the development of the personalized educational programs to address the unique needs of each child. Under the Act each IEP must include specific statements of educational objectives, services and evaluation procedures for each disabled child. 34 C.F.R. §300.346.

In addition, each child must be provided with specially designed instruction and related services which address the child's unique identified needs. 20 U.S.C. Section 1401(16), (17) and (18). Further, the education and related services set forth in the child's IEP must address all of the child's disabling conditions *Russell by Russell v. Jefferson School District, supra; Town of Burlington v. Department of Education, supra.* at 788.

The District's argument that nothing further is required once a disabled child is found to be receiving "some benefit" would render these provisions meaningless. Under the District's interpretation, taken to its logical conclusion, the District would be in compliance with the Act as long as it provided any special education at all to a multi-disabled child aimed at addressing just one aspect of her disabling condition, so long as that education was reasonably calculated to result in some benefit with respect to that one aspect. Clearly, such a result would be inconsistent with the statutory intent of requiring districts to consider each child individually and to design and provide a personalized educational program which addresses the unique educational needs of each disabled child. Polk, *supra*.

Furthermore, educational "benefit" under the Act is not synonymous with any benefit at all. A complying educational program must be reasonably calculated to provide benefit which is more than trivial *Hall by Hall v. Vance County School District, supra*, and which some courts have described as "meaningful", *Polk, supra*, or "adequate" *J.S.K. v. Hendry County School Board, supra*. Such a program must be reasonably calculated to achieve "effective results," *Town of Burlington v. Department of Education, supra*, at 788. Moreover, the *Rowley* court specifically noted that it was not intending to create a single test for evaluating the adequacy of education provided under the Act and that its enunciated test was limited to the specific facts before it:

> We do not attempt today to establish any one test for determining the adequacy of educational benefits conferred upon all children covered by the Act. Because in this case we are presented with a handicapped child who is receiving substantial specialized instruction and related services, and who is performing above average in the regular classrooms of a public school system, we confine our analysis to that situation. 458 U.S. at 202.

Thus, educational benefit is not to be measured by any one test. Further, it must be adequate and appropriate as well as meaningful (at least in the sense of more than trivial), taking into account all the surrounding circumstances applicable to the individual child and further taking into account the Act's requirements that IEPs must address all aspects of a child's disability. It is therefore insufficient for a district, as was done here, to determine mechanically that because a child is receiving "some benefit" from some aspect of special education, related services are not required. Instead, the individual circumstances and needs of each child must be considered to determine the significance of any needs of the child that are not being met by special education and to consider means to address those needs, as appropriate. *Polk, supra; Hall by Hall v. Vance County School District, supra;* see *Town of Burlington v. Department of Education, supra.*

A determination of sufficiency of educational benefit for A[redacted], for example, must focus on her current and longer-term needs and goals. During the contested period of time last year, A[redacted]'s IEP, her parents, and her direct service providers from her staffing team all identified reduction of running behavior at home, at school and in the community as A[redacted]'s No. 1 educational priority in order to address significant safety issues and work toward achieving a long-term goal of semi-independent living. Moreover, the staffing team noted that the need for progress in this area was becoming more urgent with the passage of time as the use of close external measures to control (but not eliminate) running had become less and less age-appropriate. In addition, all of these individuals agreed that no progress with respect to running behavior had occurred over the three-year period it had been addressed by the District. Under these circumstances, any determination during 1992-93 that A[redacted] was benefiting from her education without a determination that she was benefiting in the area of controlling her running was inconsistent with the Act. Thus, the District's position that A[redacted]'s running behavior did not have to be addressed under the Act in 1992-93 and that the need for recreation as related service to deal with her running did not have to be addressed during that time was contrary to the requirements of the Act.[15]

B. District's Obligation to Deal with Running Outside of School. At the present time reducing running behavior remains A[redacted]'s No. 1 educational priority as set forth in her IEP. Whereas in the past (up through at least the end of the 1992-93 school year) there was no dispute or question that the running behavior was a serious problem and had severely interfered with progress at home, at school and in the community, the evidence before the Administrative Law Judge indicated that running at school may be waning and may be less of a problem than it has been in the past. The evidence clearly established, however, that running remained a serious problem in the community and at home.

At hearing before the Administrative Law Judge, the question arose as to the District's obligations with respect to A[redacted]'s running behavior, if her running behavior fades at school but remains a problem elsewhere. The District's position as to its legal responsibilities on this issue is somewhat equivocal; the parents argue the District would be legally required to address A[redacted]'s running under such circumstances.

Pursuant to the IDEA, within less than one year the District will be required to provide a plan for A[redacted]'s eventual transition from special education after she completes school. 20 U.S.C. Section 1401(19) and (20)(D). The undisputed evidence to date indicates that A[redacted]'s autistic running behavior seriously interferes with her ability to function semi-independently in the community or in a home setting. In view of the long-term goal for A[redacted] of semi-independent living (which is acknowledged by all to be fully consistent with her academic achievement), as well as her IEP goals of reducing running in school, the community and at home, and in view of the goals of increasing safety awareness in these settings and the acknowledged need to generalize A[redacted]'s academic and other achievements in the community because of her autism and multi-handicapped condition, there can be no question that A[redacted]'s autistic running behavior continues to interfere with A[redacted]'s educational goals and objectives. Thus, even if A[redacted]'s running behavior fades at school, to the extent such behavior in other settings remains a problem which interferes with A[redacted]'s educational goals and objectives, the District is obligated to deal with this identified issue by providing all of the special education and related services needed by A[redacted] to address this issue. 34 C.F.R. Pt. 300, App. C, Questions 44 and 45. See *Polk, supra,* (emphasizing legislative purpose of fostering self-sufficiency); *McKenzie v. Smith*, 771 F.2d 1527 (D.C. Cir. 1985) (emotional and educational needs of a child could not be separated).

C. Need for Recreation as a Related Service to Address A[redacted]'s Running Behavior. Having determined that in 1992-93 and currently the District had (and has) an obligation to address A[redacted]'s running behavior and that in 1992-93 the District had an obligation meaningfully to consider whether A[redacted] had a need for recreation as related service to address her running behavior, the Administrative Law Judge nevertheless concludes A[redacted] has failed to meet her burden of establishing that as of September 1993 A[redacted] required recreation as related service and specifically special olympics to address her running behavior and benefit from her education with respect to running.

While the IHO found that as of June 1993, A[redacted] required recreation as related service to learn to control her running behavior, and thus benefit from her education, the Administrative Law Judge has found, at least as of the state level review hearing, that A[redacted] has not met her burden of establishing this proposition. The credible expert testimony, even as of June 1993, and certainly at the state level hearing, was in conflict both as to the cause of A[redacted]'s running and its likely solution. For example, Marcia Braden and Josie Nerger (A[redacted]'s special education teacher last year) felt that the running was caused mostly by sensory deficits which could be addressed by a program of gross motor activity based upon sensory integrative therapy which was highly structured, regular, consistent, intensive and motivational. These opinions were supported by Karen Selley, O.T.R., who envisioned such a plan as part of an overall sensory integrative O.T. program which would include gross and fine motor and calming/focusing activities.

In contrast, although she recognized that A[redacted] has sensory deficits which need attention, O.T.R. Joanne Driscoll was not convinced as of the IHO hearing that A[redacted]'s running was significantly related to these deficits or that recreation as related service would substantially assist in controlling A[redacted]'s running. (However, for educational reasons unrelated to A[redacted]'s running, Driscoll did recommend controlled and consistent gross motor activities including adaptive PE in order to address A[redacted]'s sensory deficits, and to provide appropriate and needed sensory input and motor development). Similarly, Lewis Jackson, consistent with his emphasis on the motivational aspects of A[redacted]'s running, was of the opinion that A[redacted] did not require recreation as related service to control her running. Jackson felt that his inclusion model, along with his emphasis on such things as meaningful choices and peer support, would resolve A[redacted]'s running behavior without the need for recreation as related service.

Furthermore, by September 1993, A[redacted]'s summer and fall primary direct service providers reported running at school was substantially less of a problem than it had been previously and none saw the need for recreation as related service to control running. While these individuals were not familiar with A[redacted]'s continued running at home and had only limited applicable experience with A[redacted] (the summer program was short, involved many adults and few students, and included intensive one-on-one O.T. services for A[redacted]; and the fall semester was in its early stages), it is clear that their testimony certainly did not provide any support for the proposition that A[redacted] requires recreation as related service to control her running behavior.

The expert evidence on both sides of this issue was equally reasonable and credible. Neither side presented any research which would empirically support either plan for controlling A[redacted]'s running to the exclusion of the other. Both sides, instead, relied on competing theoretical analyses. Moreover, although there was evidence indicating that the inclusion model for autistic children is not without controversy, there was no evidence indicating Jackson's position in regard to inclusion of such children is without reasonable support among special education experts. Furthermore, the limited information available with respect to A[redacted]'s apparent decrease in running behavior at school during the summer and the beginning of the fall term (when certain of Jackson's ideas were implemented) appears to lend some support to Jackson's approach. Thus, the existing evidence based on current circumstances supports a determination that Jackson's plan is reasonably calculated to provide A[redacted] with benefit with respect to her running.

Primary responsibility for formulating an educational program for A[redacted] does not lie with the courts or the Administrative Law Judge. *Rowley, supra; Spielberg v. Henrico County Public Schools, supra; Daniel R.R. v. State Board of Education*, 874 F.2d 1036 (5th Cir. 1989); *Johnson v. Independent School District No. 4 v. Bixby*, 921 F.2d 1022 (10th Cir. 1990). Where there is room for reasonable disagreement, reviewing officials should not impose their own personal views of preferable educational methods on the educational agencies making those decisions. *J.S.K. v. Hendry County School Board, supra; Russell by Russell v. Jefferson School District, supra*. In light of the conflict in the credible expert testimony concerning A[redacted]'s need for recreation as related service to address her running behavior, and in light of the evidence indicating the Jackson plan is reasonably calculated to enable A[redacted] to receive educational benefit with respect to her running, the Administrative Law Judge is unable to conclude A[redacted] has met her burden of establishing such a need exists for recreation as related service, specifically to address A[redacted]'s running behavior. Under these circumstances there has been no showing that the related service requested by the parents is required to address A[redacted]'s running behavior. *Irving Independent School District v. Tatro*, 468 U.S. 883 (1984); *Livingston v. DeSoto County School District*, 782 F. Supp. 1173 (N.D. Miss. 1992).

D. Special Olympics. The parents also argue that A[redacted] is entitled to special olympics as a specific related service to address her running behavior. Because the parents failed to meet their burden of establishing that recreation as related service is required to address the running behavior, the parents have also failed to establish that A[redacted] is specifically entitled to special olympics as a recreational related service to address that problem. Further, although the uncontested evidence indicates A[redacted] is entitled to services (however denominated) to address her sensory deficits (but not specifically to deal with her running), (see Discussion, Part IV. F, *infra*), there was no evidence at all to support the proposition that such services must be in the form of special olympics.

E. Approach for Addressing Running Behavior. Despite the fact that the evidence failed to support the proposition that A[redacted] requires recreation as related service (or specifically special olympics) to address her running behavior, the Administrative Law Judge has found that A[redacted]'s running behavior (in all settings) must be addressed in order for A[redacted] to benefit from her education. The District has proposed the Jackson program to deal with A[redacted]'s running. The parents have no objection to the program *per se*, but do not believe it will effectively control A[redacted]'s running or that it is reasonably calculated to do so without the addition of recreation as related service, specifically special olympics. The Administrative Law Judge has found the parents failed to meet their burden in this regard and that Jackson's plan represents an appropriate effort, reasonably calculated to result in educational benefit, to deal with A[redacted]'s running. Thus, consistent with the FAPE requirements of the Act, absent an agreement by the parties concerning some other approach or an agreement to amend the Jackson approach, for the present A[redacted]'s running behavior should be addressed in accordance with the Jackson plan.

F. Need for Specialized Services for Sensory Deficits. Although the evidence did not support a finding that A[redacted] requires recreation as related service specifically to address her running, the evidence did support the conclusion that A[redacted] does require, quite apart from the issue of running, specialized services (whether demonstrated in whole as O.T. or partly as recreation) focused on sensory interactive techniques to address her sensory deficits in order to provide the appropriate input and motor development that A[redacted] needs to continue to improve in her overall daily function and ability to learn. Such activities must include fine motor and calming/focusing activities, as well as gross motor activities which should provide consistent, structured and frequent proprioceptive and vestibular sensory input. The evidence did not establish any need to provide these services outside of the regular school day. The evidence did establish, however, that as of the state level hearing the District was not providing a program which complied with these requirements with respect to gross motor activities because the activities being provided by the District were not sufficiently structured, frequent, consistent, or adequately planned, and did not provide the range of sensory input required.

V. Appropriate Relief

The parents seek an order for compensatory education to address the District's statutory violations. The District asserts compensatory education is not appropriate.

Although the Act is silent as to the specific authority to grant compensatory relief at the administrative level, the Act provides that upon judicial review of a state or local agency decision, courts may grant "such relief as the court determines is appropriate," 20 U.S.C. Section 1415(e)(2). *Burlington School Committee v. Department of Education*, 471 U.S. 359 (1985) established pursuant to this provision that courts may order reimbursement to parents for costs of special education that should have been provided under the Act. Similarly, a court order for compensatory education is an appropriate remedy to cure a denial of service that should have been provided under the Act. *Meiner v. State of Missouri*, 800 F.2d 749 (8th Cir. 1986); *Lester v. Gilhool*, 916 F.2d 865 (3rd Cir. 1990). In view of the established authority of courts under the Act to order compensatory relief and in the absence of any express authority or other limitations on granting such relief at the administrative level, the Administrative Law Judge concludes authority exists under the Act for an award at the administrative level of compensatory education.

Having determined that compensatory education may be an appropriate administrative remedy for IDEA violations, the question arises as to whether compensatory education is an appropriate remedy under the facts of this case. The District's procedural violations in this matter constituted the denial of a FAPE. The Administrative Law Judge further found that although the parents' position regarding special olympics was reasonable and the opinion that A[redacted] needs this service to benefit from her education was held by reasonable and credible individuals, the parents nevertheless failed to meet their burden of establishing that recreation as related service is in fact required for A[redacted] to benefit from her education with respect to her running behavior. Nor has it been established that the IEP eventually offered by the District (which omitted recreation as related service) substantively violated the Act or failed to provide a FAPE.

Thus, if compensatory education is appropriately granted only where specific educational services have been wrongly withheld, it is not an appropriate remedy here where there has been no finding that the District wrongly withheld recreation as related service to address A[redacted]'s running. However, if the purpose of compensatory education is to provide a remedy for violations of the Act in general, then such an order would be appropriate here. The Administrative Law Judge concludes the latter interpretation of the Act more accurately reflects its legislative purpose.

Case law interpreting the Act (see, Discussion, Part III) is very clear that Congress intended to rely very heavily on the procedural safeguards of the Act to assure delivery of a FAPE to disabled children and to assure parental involvement in development of educational programs. The foremost procedural right and safeguard in the Act is joint and meaningful parental participation as partners with the local education agency in designing an appropriate personalized education program for their children. To that end, as noted above, *Rowley* and numerous cases thereafter have emphasized a two-step process in determining whether there has been compliance with the Act. First, courts must determine if the procedural requirements of the Act have been satisfied. Following that determination, courts are also charged with deciding whether the IEP developed is reasonably calculated to the enable the child to receive educational benefit. Violation of either aspect of this test, in isolation, may result in a determination that the Act has been violated and the child has been denied a FAPE. Thus, even where no substantive violation has been found (e.g., where there is no determination that the IEP is lacking under the Act), procedural violations can result in a determination the Act has been violated and can result in invalidation of actions improperly taken by the local education agency. *Spielberg v. Henrico County Public Schools, supra.*

In this case there appear to be two possible remedies for the District's procedural violations. The Administrative Law Judge could merely order the District to reinstitute staffing procedures for A[redacted], this time giving appropriate, meaningful, good faith consideration to the views of the parents and the staffing team. While it is, of course, important for the District henceforth to give such consideration to the views of the parents, such a remedy is clearly not adequate in this case. Because A[redacted]'s last annual IEP review was conducted in November 1992, she is due for a new staffing immediately even without such an order. Merely ordering, without more, that the District do at this staffing what it should have done a year ago provides no remedy to the parents for the period of time when they were deprived by the District's actions and lack of good faith of their right meaningfully to participate in the staffing process. That deprivation was by no means trivial. Although the Administrative Law Judge has been unable to find as a matter of law that the IEP eventually proposed by the District denied A[redacted] a FAPE, the Administrative Law Judge has also found that the proposal of the parents and staffing team was a reasonable one. It is certainly conceivable that had the District been willing to give meaningful consideration to the parents' and the staffing team's views and concerns a year ago, the District might have been convinced to provide the services sought by the parents. Alternatively, meaningful joint participation might have resulted in a compromise IEP acceptable to both sides. However, the District's procedural violations, taken as a whole, prevented the parents and staffing team from having any meaningful opportunity to fully discuss with the District their proposal for dealing with A[redacted]'s unique educational needs.

Thus, the relief of merely ordering the District to comply with the Act in the future is inadequate to vindicate the parents' procedural rights under the Act; it does not cure the past procedural violation. Further, a determination that compensatory education orders are inappropriate under circumstances such as this would provide no incentive for future procedural compliance by the District. In addition, such a decision potentially could actually encourage local education agencies to develop IEPs without adequate parental input since victimized parents would have no meaningful recourse as long as the resulting IEPs substantively complied with the Act.

It is apparent that the "appropriate remedy" provision of the Act permits entry of orders, including orders for compensatory education, to cure deprivation of a handicapped child's statutory rights. *Lester v. Gilhool, supra.* Such orders are one means to assure the child's right to a FAPE, the parents' right to participate fully in developing a proper IEP, and all procedural safeguards of the Act are complete. *Burlington School Committee v. Department of Education, supra.* Moreover, Congress did not intend to permit districts to engage in substantial violations of the Act with impunity. *Lester v. Gilhool, supra.* To that end, equitable considerations are relevant in fashioning relief under 20 U.S.C. Section 1415(e)(2), and under certain circumstances the remedy may exceed the scope of the original right in order to cure the statutory violation, *Lester v. Gilhool*, 916 F.2d at 873, n.11; *Burr v. Ambach*, 863 F.2d 1071 (2nd Cir. 1988) (extending compensatory education beyond the age of 21).

In the present case, an award of compensatory education in the form of recreation as a related service and, in particular, special olympics constitutes appropriate relief under the Act for the District's procedural violations.[16] This is the provision the parents sought to have placed in A[redacted]'s IEP beginning in November 1992 and it is concerning this request that they were denied meaningful participation in A[redacted]'s staffing proceedings. Further, such a request is not unreasonable; is not prohibited by the Act; is supported by credible expert opinion; and is not prohibitively expense to provide. While in the end the Administrative Law Judge has found the parents did not meet their burden of establishing such a provision is legally required in A[redacted]'s IEP, this is a situation where it is appropriate to fashion a remedy which perhaps exceeds the scope of the original right, in view of the equities and all the surrounding circumstances. If compensatory education were not awarded in the case, the parents' procedural rights under the Act would be illusory.

The Administrative Law Judge therefore determines that an award of recreation as related service, specifically special olympics, for a one-year period, is appropriate in this matter. This is the period of time which would have been covered by the parents' original request, since IEPs are reviewed annually. As compensatory education, the District shall provide local transportation and a paid one-on-one trained aide, experienced with autistic or severely disabled children, for A[redacted] to participate in recreational activities provided through the special olympics organization, for a period of one year, excluding summer vacation, beginning with the next cycle of special olympics. Transportation expenses for out-of-town activities for special olympics shall be borne by the parents or by private contributions generated by the parents or by their advocacy group. If these transportation expenses are met, the District shall provide a one-on-one trained aide to accompany A[redacted] to out-of-town activities. The aide's responsibilities shall include supervision of A[redacted] at special olympics, input to special olympics coaches as appropriate, collecting appropriate data concerning A[redacted]'s behaviors at special olympics, and providing input to members of A[redacted]'s staffing team as requested.

CONCLUSIONS OF LAW

1. The District's procedural violations with respect to A[redacted]'s staffings during the 1992-93 school year, taken as a whole, were sufficiently egregious to violate the IDEA and constituted a denial of a FAPE.

2. In order to provide A[redacted] with a FAPE, the District must address A[redacted]'s running behavior in her IEP in a manner reasonably calculated to enable A[redacted] to receive educational benefit with respect to that running behavior at school, at home and in the community. Such obligation will continue to exist as long as the running inteferes with A[redacted]'s long-term educational goals and objectives, even if A[redacted]'s running behavior at school continues to wane.

3. The parents have failed to meet their burden of establishing that recreation as related service and specifically special olympics is required to address A[redacted]'s running behavior in a manner reasonably calculated to enable A[redacted] to receive education benefit with respect to that running behavior.

4. At the present time and based on current information, the Jackson plan is reasonably calculated to provide educational benefit to A[redacted] with respect to her running behavior.

5. Quite apart from the issue of addressing her running behavior, A[redacted] requires regular, consistent and frequent services, as more fully described in paragraph 100 of the Additional Findings of Fact, focusing on sensory integrative techniques (whether denominated wholly as occupational therapy or partially as recreation and partially as occupational therapy), including fine and gross motor activities and focusing/calming activities, to benefit from her education. The evidence did not establish that such activities must be conducted outside the regular school day or that such activities are specifically necessary to address A[redacted]'s running behavior. As of the state level hearing, the District was not providing A[redacted] with a sensory integrative program with respect to gross motor activities, which complied with these requirements.

6. In connection with the District's procedural violations of the Act, A[redacted] is entitled to compensatory education in the form of recreation as related service, specifically District support for A[redacted]'s participation in special olympics, for a period of one year.

ORDER

1. The order of the IHO is vacated in full.[17] This matter is remanded to the District to conduct a new staffing and develop a new IEP[18] consistent with this decision including meaningful and appropriate participation by the parents. The staffing shall take place within 15 days.

a. The new 1993-94 IEP shall address, *inter alia*, A[redacted]'s running at school, home and in the community in a manner reasonably calculated to provide educational benefit with respect to that running behavior. Unless otherwise agreed by the parties to this action, an IEP which includes all elements of Dr. Jackson's plan and proposal for A[redacted] shall be considered an adequate means of addressing A[redacted]'s running behavior for the next year or such shorter period of time agreed upon by the parties, to be reevaluated after that time. The District's obligation to address A[redacted]'s running shall continue even if such behavior at school continues to wane, as long as such running behavior continues to interfere with A[redacted]'s long-term educational goals and objectives, including eventual semi-independent living.

b. Unless otherwise agreed by the parties to this action, the 1993-94 IEP shall include provision for controlled, consistent, frequent and structured specialized services (whether denominated as O.T. or recreation) in the areas of gross and fine motor as well as calming/focusing activities focused on sensory integrated techniques to address A[redacted]'s sensory deficits, unrelated to her running behavior. With respect to gross motor activities to be provided under this provision, such activities shall be individualized to address A[redacted]'s unique sensory deficits; shall be frequent (preferably daily for one school period or the equivalent each day); and shall involve adequate direct or indirect O.T. or recreational related services, consistent with Additional Findings of Fact 100, to assure the activities are appropriately addressing A[redacted]'s sensory needs in an age-appropriate and motivational manner. Gross motor activities shall focus on heavy proprioceptive and vestibular input as well as joint compression. Such activities may be provided in school and during the school day as long as they are available in this setting.

c. The 1993-94 IEP shall also include compensatory education as set forth in paragraph 2 below.

d. At the end of the period of time covered by the 1993-94 IEP or such shorter time as the parties agree, the parties shall specifically evaluate whether Jackson's proposal has been effective in reducing A[redacted]'s running behavior at school, at home and in the community. At that time, the parties shall also determine, in light of A[redacted]'s unique then-current educational needs and circumstances, whether Jackson's plan is reasonably calculated to lead to education benefit with respect to A[redacted]'s running behavior in the future. In the event the parties jointly determine at that time that the Jackson plan does not meet these criteria, a new plan to deal with any remaining running behavior shall be formulated and implemented, giving appropriate and meaningful consideration to any proposals of the parents.

2. As compensatory education, the District shall provide A[redacted] with local transportation and a one-on-one trained aide for one year of special olympics, excluding summer vacation, to begin with the next cycle of special olympics activities, under terms set forth in Part V of the Discussion.

This decision of the Administrative Law Judge is the final decision on state level view. State Plan, Part II, Section B, VII, B, 10.

DONE AND SIGNED this

2nd of December, 1993

Judith F Schulman
JUDITH F. SCHULMAN
Administrative Law Judge

FOOTNOTES

[1] An IEP is a written statement, updated annually, for each child with a disability developed at a staffing by various professionals and the child's parents. An IEP is required to be designed for the unique needs of the child and includes a statement of measurable goals and needed services, plus a method of annual evaluation of the child's program. 20 U.S.C. Section 1401(a)(20); 34 C.F.R. §300.340 *et seq.*

[2] A triennial review involves a reevaluation of the child, 34 C.F.R. §300.534.

[3] Pursuant to CDE's audit, the District was also informed of certain specific deficiencies in connection with the ASIEP program. In response to these matters, in March 1993 the District, among other things, committed to have present at all staffings for children identified as having autism, special education supervisors to assure that more than a single service delivery option was made available to these children. The record does not establish that this commitment was made or implemented on a general basis by the District any time prior to March 1993.

[4] Testimony by the District indicated that it would have been willing to consider recreation as related service if Jackson had recommended it. This testimony is somewhat speculative since Jackson did not make such a recommendation. Furthermore, in the absence of such a recommendation from Jackson, the District refused to consider such an option and thus foreclosed any meaningful discussion concerning the parents' requested approach to dealing with A[redacted]'s problem.

[5] In fact, the District provided compensatory O.T. services substantially in excess of the agreed upon amount.

[6] Presumably, the scheduled track will change to some other PE activity for the winter months.

[7] Although certain of the District's employees expressed confusion as to the definition of "direct" and "indirect" services, it is clear that direct services are those provided by a specially trained therapist directly (with no intermediaries) to the child, while indirect services include providing consultation and training to other individuals who then provide the services to the child.

8/ Implementation of some of these changes (e.g. providing more choices and more interesting and functional activities) had actually begun during the last semester of 1992-93 school year.

9/ Although the District's witnesses all testified that A[redacted]'s current (lack of) running behavior was not interfering with her academic performance and would not require future institutionalization, it appears that none of these witnesses was aware that A[redacted]'s running behavior outside of the school grounds has continued unabated. These opinions were therefore not particularly helpful to the Administrative Law Judge in resolving the issue of how A[redacted]'s out-of-school running will impact on her future academic progress and long-term educational goal of semi-independent living.

10/ The current program also does not fit the description of a regular, structured, consistent, high intensity, program of motivational recreation services, as requested by the parents and staffing team.

11/ The IHO's order states that if the District is required to provide special olympics, the District is to provide transportation and a one-on-one trained aide to implement the program and chart A[redacted]'s progress with regard to her running behavior. The order further provides that if A[redacted] is provided with special olympics and her running behavior has not decreased by 50% after six months, the District shall have no obligation to provide further special olympics, but if there is a decrease in the six months the District shall continue to provide special olympics until A[redacted]'s running behavior has been completely replaced by appropriate behavior for a period of one year.

12/ The IHO's order provides that the District shall provide local transportation and a paid one-on-one trained aide for A[redacted] to participate in the next available cycle of special olympics activities.

13/ To the extent the District's comprehensive plan is inconsistent with state procedures, the latter must prevail.

14/ The District's later agreement to abide by the recommendation of an outside consultant on the issue of recreation as related service does not alter this conclusion because the District refused at all times to give any credence or substantive consideration to the opinions of the parents and the staffing team on this issue.

15/ In fact, the District's position that it is not required under the Act to consider providing related services to address A[redacted]'s running does not appear to be consistent with other actions taken by the District during 1992-93 school year. For example, despite the District's determination that A[redacted] was receiving educational benefit, the District did not seek to eliminate any other related services she was receiving. Nor does the District object to providing O.T. services which at least arguably address the running behavior. While the District may argue some or all of these services are being provided voluntarily and are not legally required, the Administrative Law Judge concludes this action in fact reflects the District's predetermination not to provide recreation as related service unrelated to A[redacted]'s individual needs and motivated by a distaste for providing this service rather than a consistently held legal position relating to the District's statutory obligations with respect to related services in general.

16/ The Administrative Law Judge has also found the District failed to fully provide appropriate services with respect to A[redacted]'s sensory deficits. However, compensatory education is not an appropriate remedy for this infraction. This matter arose at hearing as a side issue related to the question of recreation as related service to address running, and separate compensatory relief was not sought with respect to this issue independently. In addition, at the time of the state level review hearing, A[redacted]'s program was still in flex and the fall term was still in its early stages; such relief would therefore be premature under the facts of this case.

17/ In view of this order, the issues raised by the parties concerning the clarity and enforceability of portions of the IHO's order are moot.

18/ At hearing, the parties stipulated that A[redacted]'s last agreed upon IEP was in effect during the pendency of this proceeding, but disagreed as to whether that included the 1993 IEP addenda. Given the parties' stipulation, it is apparent that all agreed upon aspects of A[redacted]'s January-May 1993 IEP addenda should be considered part of her existing IEP.

CERTIFICATE OF MAILING

I hereby certify that I have mailed a true and correct copy of the above **DECISION UPON STATE LEVEL REVIEW** to:

Deborah S. Menkins, Esq.
Holme, Roberts & Owen
90 South Cascade Ave., #1300
Colorado Springs, CO 80903

Leo L. Finkelstein, Esq.
Pikes Peak Legal Services
617 South Nevada
Colorado Springs, CO 80903

by depositing same in the U.S. Mail, postage prepaid, in Denver, Colorado; and to: Fred Smokoski, Special Education Director, 201 E. Colfax Ave., Denver, Colorado 80203 via State InterAgency Mail, on this 3RD day of December, 1993.

Sally Brown
Secretary to Administrative Law Judge

Case Number: 93.501

Status: Complaint Findings

Key Topics:
Discipline
Free Appropriate Public Education (FAPE)
Individualized Education Plan (IEP)

Issues:

- Whether or not the District identified specific services on the IEP and whether or not the District was providing those services.
- Whether or not regular school rules and disciplinary procedures apply.

Decision:

- Although the IEP stated that regular school rules and disciplinary procedures do not apply, there was no alternative behavioral or discipline plan; thus it could not be determined if more strict or more lenient standards apply.
- An IEP in which goals and objectives lacked specific criteria and in which services were to be provided "as needed" does not meet the requirement for a specific IEP.

Discussion:

- Legal standards for IEPs include objectives with specific criteria and evaluation procedures, as well as specified services and amount of services.
- IEPs must address behavior/discipline if normal rules and discipline process do not apply, or if they do apply and the district has determined serious emotional disturbance, how adherence to normal rules and discipline process would be instructionally supportive to the student.

FEDERAL COMPLAINT NUMBER 93:501

FINDINGS AND RECOMMENDATIONS

I. PRELIMINARY MATTERS

A. The complaint was received by the Federal Complaints Coordinator, Colorado Department of Education (CDE), on March 4, 1993.

B. The complaint was brought by S.M. against El Paso County School District #11 (the district), on behalf of her son, and all other similarly situated students.

C. The process for receipt, investigation and resolution of the complaint is established pursuant to the authority of the Individuals With Disabilities Education Act 20 U.S.C. 1401 et. seq., (the Act), and its implementing regulations concerning state complaint procedures, 34 C.F.R. 300.660-300.662 and Colorado State Board of Education Policy No. 1280.0.

D. The complaint was brought against the district as a recipient of federal funds under the Act. It is undisputed that the district is a program participant and receives federal funds for the purpose of providing a free appropriate education to eligible students with disabilities under the Act.

E D.M. is a student with disabilities eligible for services from the district under the Act.

F. The complaint was accepted, in part, for investigation based upon a determination that CDE had jurisdiction over several of the allegations contained in the complaint pertaining to violations of federal law and rules in a federally funded program administered by CDE.

G The timeline within which to investigate and resolve this matter is on or before May 3, 1993.

H The investigation of the complaint included a review of the documents submitted by the parties, telephone interviews with S.M. and the principal, and consideration of relevant case law and federal agency opinion letters.

II. STATEMENT OF THE ISSUE

A. The issue investigated was whether or not the district has violated the provisions of the Act by failing to provide D.M. a free appropriate public education as alleged by the following:

1. by not convening a staffing in a timely manner,
2. by not providing the services called for on his individualized education program (IEP) due to the IEP being non specific, and
3. by not providing him with an appropriate placement.

B. RELEVANT STATUTORY AND REGULATORY CITATIONS

20 U.S.C. 1401(16), (18) and (20) and 1414.

34 C.F.R. 300. 2, 300.8, 300.11, 300.14, 300.17, 300.121, 300.130, 300.180, 300.235, 300.300, 300.302, 300.340, 300.342, 300.343, 300.346, 300.348 and 300.351.

Fiscal Years 1992-1994 State Plan Under Part B of the Individuals With Disabilities Education Act,(State Plan), Section V. E., X. B.

C. FINDINGS

1. At all times relevant to the complaint, the district was receiving funds under the Act pursuant to an approved application for funding.
2. The funds were paid to the district, in part, based on the assurances contained within the application.
3. One of the assurances made by the district was that, in accordance with the Act, it would provide a free appropriate public education, including special education and related services, to each student with disabilities within its jurisdiction to meet the unique needs of that child. In carrying out its responsibilities under the Act, the district

identified D.M. as a student with disabilities and developed an IEP for him.

4. IEPs for D.M. were developed as follows:

   a. An initial IEP for D.M. was developed on 1/30/90,

   b. An annual review IEP for D.M was developed on 5/18/92 in the Harrison school district,

   c. A triennial review for D.M. was developed on 2/10/93 in the El Paso #11 school district, and

   d. An IEP meeting was initiated on 3/30/93 to update D.M.'s IEP, but the meeting was terminated after determination of current levels of functioning and before determination of handicapping condition and annual goals.

5. D.M. was enrolled at Emerson Junior High School on 10/29/92 and started attending on 10/30/92. According to the district, D.M. was placed in a self-contained SIED program upon enrollment based on the 5/18/92 IEP.

6. The IEPs for D. M. stated the following:

   a. The annual review dated 5/8/92 indicates "No" checked to the question, "Do regular school rules and disciplinary procedures apply?"

   b. The triennial review dated 2/10/93 indicates:

      (1)Present Levels of Functioning: "teachers report very significant negative behaviors in several areas, including hyperactivity, attention problems, and conduct problems. See Report."

      (2)Report (from above) states: "...behaviors which are strongly indicative of both emotional disturbance and conduct disorder....."is disobedient, out of control of adults, and is repeatedly in trouble with school authorities". "Recommendations: D. should be part of the development of a plan to manage his behavior".

(3)Goals state numbers and letters with no specific wording. Short term objectives include the words "will increase...", "will hand in work...", "will continue to work on" and "will give attention to..."but do not include objective criteria and evaluation procedures for determining whether they are being achieved.

(4)Description of Services/Modification states: "small class size as needed for educational success, P.C. for math as needed, Social work as needed".

(5)"No" is checked to the question, "Is there a Special I.E.P. Discipline Plan in Effect?"

(6)Recommended placement in the least restrictive environment is "S.I.E.D." "District-level special education program.

c. The incomplete IEP dated 3/30/93 had "No" checked to the question, "Are the assessments completed of sufficient scope and intensity to make staffing decisions". Needs stated include "needs help in understanding cause/effect of own behavior".

7. According to the Emerson Jr. High School class attendance summary, D.M. was :

   a. suspended on 12/9-11/92, 1/13-14/93, and 2/10-12, 14-16 /93, and

   b. truant or unexcused on 12/4/92, 12/17-18/92, 1/6/93, 1/11/93, 2/17/93 through 4/9/93.

8. A letter dated 2/25/93 from S.M. to the district Administration Office states, "...D. is out of school and has no home bound studies at this time. Can you please look into this matter!"

9. A letter of intent to return to school dated 2/26/93 which was sent to S.M. and signed , states "D. is being held out of Emerson, waiting placement in the NEEDS Program, at both his mother's and the Principal's request. D. had an altercation with another student and both feel it is in the best interest of D. to proceed directly to NEEDS and not return to Emerson at this time. He will be coded "Z" when this occurs" (Z refers to"institution" on class attendance summary report.) According to the special education manager and the principal, this amendment, however, was typed on the form by a secretary who was told this by S.M. and mistakenly assumed it had been approved by the administration. According to the principal, he had consistently advised S.M. that D.M. needed to return to Emerson

10. A formal Notice of Non-Compliance with School Attendance Law was sent to S.M. on 3/5/93 which indicated that by 3/15/93 court proceedings would be initiated if the child failed to attend school regularly.

11. An application for approval of home instruction was signed by S.M. and by a physician on 3/15/93. According to S.M., tutoring began on 3/29/93.

12. According to the district, D.M. began attending North Junior High School on 4/12/93 on a "30 day diagnostic placement". No IEP was developed with regard to this placement, but an IEP meeting is to be scheduled within 30 school days. In the interim, the IEP team is to determine what assessments need to be readministered once D.M. has been receiving his hyperactivity medication for a time period deemed appropriate by his physician.

III. CONCLUSIONS

A. D.M. was suspended for three days in December, two days in January, and four days in February, for a total of nine days. At that time, he was receiving special education and related services according to the IEP dated 5/8/92 which indicated that regular school rules and disciplinary procedures do not apply. However, there is no evidence of an alternative behavioral or discipline plan, so it cannot be determined if D.M. was to be held to a more strict or more lenient standard and procedure than called for by regular school rules and disciplinary procedures. The Act is not violated per se by a series of suspensions that total nine days. It therefore, cannot be concluded that the suspensions violated the behavior plan nor that there was a legal obligation to provide services during the suspensions.

B. A triennial review was held and an I.E.P for D.M. was developed by the district on 2/10/93. A full and individual evaluation of a child's needs must be conducted every three years (34 C.F.R. 300.534); and this review was eleven days after the due date of 1/30/93. This short delay, although not meeting the legal requirement, does not appear to have substantially impacted the child's education.

C. While the IEP dated 2/10/93 states that no special discipline plan for D.M. is in effect, this appears to be incongruent with information recorded regarding D.M.'s current level of functioning. Further, there is no documentation indicating why or how adherence to normal rules and discipline process would be instructionally supportive to the student in view of the statements of the IEP team. The statements on the IEP clearly show the student has specific behavioral/discipline needs.

D. Goals and objectives as identified on the IEP dated 2/10/93, do not include objective criteria and evaluation procedures in accordance with 34 C.F.R. 300.346 (a)(5). Statements such as "will increase" without specific criteria or evaluation procedures do not meet this requirement.

E. Special education and related services as identified on the current IEP dated 2/10/93 do not include a statement of the specific special education and related services to be provided in accordance with 34 C.F.R. 300.346 (a)(3). The provision of special education and related services "as needed" does not meet the requirement for a specific special education program.

F. The IEP developed for D.M. on 2/10/93 was not designed to provide him with a free appropriate public education, in violation of the Act.

G. The evidence is not clear and there appears to be two interpretations as to why D.M. did not attend Emerson Junior High School after 2/16/93. It is clear, however, that D.M. is currently attending school at North Junior High but not receiving services under an operable I.E.P. The current I.E.P. dated 2/10/93 is not specific and there is no indication of an interim I.E.P as a basis for this placement.

IV. REMEDIAL ACTIONS

1. On or before May 20, 1993, the district must facilitate an I.E.P. meeting during which the triennial review is revised or newly developed in accordance with sections 34 C.F.R. 300.343 - 347. In addition, the IEP must specifically address a behavior/discipline plan or, if not different from that of the school, how adherence to normal rules and discipline process would be instructionally supportive to this student whose functioning, according to the district's own IEP team, is indicative of serious emotional disturbance.

2. On or before May 28, 1993, the district must submit to the Federal Complaints Coordinator a copy of the I.E.P. developed for D.M. along with the specific behavior/discipline plan, if different from the norm.

V. RECOMMENDATIONS

It is clear that the IEPs, although specific relative to needs, are not specific as to goals, objectives and services to be provided to meet those needs. It is recommended that the district provide inservice training to their IEP facilitators on the need for specificity in I.E.P development. The Colorado Department of Education will assist with this if requested.

Dated this 3rd day of May, 1993

Cheryl M. Karstaedt, Federal Complaints Coordinator

Case Number: 93.502

Status: Complaint Findings

Key Topics: Free Appropriate Public Education (FAPE)
Individualized Educational Plan (IEP)

Issues:

- Whether or not the district provided an IEP that conforms with regulatory requirements.
- Whether or not the district provided services commensurate with the IEP.

Decision:

- IEP did not contain short term instructional objectives, appropriate objective criteria and evaluation procedures and schedules.
- No determination as to provision of services in accordance with IEP, due to lack of documentation and specific information on the IEP.

Discussion:

- By district's own admission, regulatory requirement for IEP were not met, therefore a new IEP was to be developed with consideration of compensatory services.

FEDERAL COMPLAINT NUMBER 93:502

FINDINGS AND RECOMMENDATIONS

I. PRELIMINARY MATTERS

A. The complaint was received by the Federal Complaints Coordinator, Colorado Department of Education (CDE), on March 29, 1993.

B. The complaint was brought by S.S. and L.S. against Adams-Arapahoe County School District 28J (the district), on behalf of their son, X.S.

C. The process for receipt, investigation and resolution of the complaint is established pursuant to the authority of the Individuals With Disabilities Education Act 20 U.S.C. 1401 et. seq., (the Act), and its implementing regulations concerning state complaint procedures, 34 C.F.R. 300.660-300.662 and Colorado State Board of Education Policy No. 1280.0.

D. The complaint was brought against the district as a recipient of federal funds under the Act. It is undisputed that the district is a program participant and receives federal funds for the purpose of providing a free appropriate public education to eligible students with disabilities under the Act.

E. X.S. is a student with disabilities eligible for services from the district under the Act.

F. The complaint was accepted, in part, for investigation based upon a determination that CDE had jurisdiction over two of the allegations contained in the complaint pertaining to violations of federal law and rules in a federally funded program administered by CDE.

G. The timeline within which to investigate and resolve this matter is on or before May 28, 1993.

H. The investigation of the complaint included a review of the documents submitted by the parties, telephone interviews, and consideration of relevant case law and federal agency opinion letters.

II. STATEMENT OF THE ISSUE

A. ISSUE

The issue investigated was whether or not the district has violated the provisions of the Act by failing to provide X.S. a free appropriate public education as alleged by the following:

1. by not providing an individual education program (IEP) that conforms with regulatory requirements, which include annual goals and short term instructional objectives with appropriate objective criteria and evaluation procedures and schedules and
2. by not providing the services called for on his individualized education program

B. RELEVANT STATUTORY AND REGULATORY CITATIONS

20 U.S.C. 1401(16), (18) and (20) and 1414.

34 C.F.R. 300. 2, 300.8, 300.11, 300.14, 300.17, 300.121, 300.130, 300.180, 300.235, 300.300, 300.308, 300.340 and 300.346

Fiscal Years 1992-1994 State Plan Under Part B of the Individuals With Disabilities Education Act,(State Plan), Section V. E.

C. FINDINGS

1. At all times relevant to the complaint, the district was receiving funds under the Act pursuant to an approved application for funding.
2. The funds were paid to the district, in part, based on the assurances contained within the application.
3. One of the assurances made by the district was that, in accordance with the Act, it would provide a free appropriate public education, including special education and related services, to each eligible student with disabilities within its jurisdiction to meet the unique

Page Three

needs of that child. In carrying out its responsibilities under the Act, the district identified X.S. as an eligible student with disabilities and developed an IEP for him.

4. An IEP for X.S. was developed on 10/5/92 indicating the following:

   a. Current Functioning:

      ...prints more efficiently than performs cursive
      ...has difficulty taking notes in class
      ...auditory skills and retention good
      ...strong verbal skills
      ...receiving passing grades
      ...not turning in completed assignments
      ...self esteem better than in past
      ...well liked by others

   b. Needs *(internal)*

      ...to improve grade in Math *(listed under functioning)*
      ...to improve cursive writing
      ...to improve organizational skills
      ...to consistently turn in assignments
      ...to ask for assistance when needed
      ...to learn keyboarding skills *(listed as characteristic of service)*

   c. Characteristics of service *(external needs)*:

      ...modifications in the areas of reading, spelling, writing, math, science, social studies *(listed at need)*
      [illegible] need a tape recorder in the classroom
      ...monitoring of acquisition of skills
      ...notes from a peer
      [illegible] for math

   [illegible] (learning disability)

e. Goals:

...Improve written language skills
...Improve reading skills
...Improve math skills
...Maintain and improve functional fine motor skills
...Develop keyboarding skills *(listed as a short term objective)*

f. Short Term Objectives
Note: information listed as short term objectives under first three goals were not child centered objectives, but rather regular education modifications.

...under fine motor skill goal:
-will utilize recommendations and adaptations necessary to facilitate success within his classes

g. Specific Services: Participation in Regular Education

...All regular education classes unassisted, monitored by special education teacher
-special education teacher and regular education.teachers to monitor progress on a monthly basis *(listed as short term objective)*

...Modifications *(listed under short term objectives):*
-peer helper to act as scribe for copying board etc.
-allow shortened written assignments
-allow oral tests instead of written tests
-allow spelling errors
-allow printing but encourage cursive
-allow use of tape recorder
-allow use of word processor with spell check when necessary
-allow more time for reading assignments
-modified/adjusted assignments when appropriate, based on needs
-utilize adjusted spelling lists
-allow use of math grid and calculator in math
-allow additional time for reading math word problems
-allow additional time for copying math problems

h. Specific Special Education and Related Services:

… .2 hrs per week (12 minutes) of consultive services by special education teacher

… .2 hrs. per week (12 minutes) of consultive services by occupational therapist

5. X.S. was enrolled as a 6th grade student at Aurora Middle School during the 1992-93 school year and participated in all regular education classes This included "Computers - Keyboarding". He attained four "C"s and one "B" during the third grading period. He received an "A" in the second quarter keyboarding class.

6. X.S. received consultive services from N.S., a special education teacher with appropriate Colorado certification (Type B Elementary Education and Type B Special Education Educationally Handicapped K-12). According to the district, the consultive services consisted of:
   a. meeting with X.S.'s previous teachers to learn about helpful accommodations and
   b. monitoring X.S.'s progress on a monthly basis.

   According to X.S.'s mother, this did not occur, or if so, was not helpful.

   No documentation of 12 minutes per week was available.

7. X.S. received consultive services from J.N., a certified occupational therapist. According to the district, these consisted of:
   a. checking with regular teachers on a regular basis to work with them on any problems,
   b. meeting with the computer teacher and home economics teacher,
   c. observing the computer class and making suggestions to the teacher and
   d. providing needed adaptive materials (pens, fan, calculator, graph paper,tape recorder, beginning word processing software program called "FredWriter").

According to X.S.'s mother this did not occur, or if so, was not helpful. The mother states that X.S. was never provided with the adaptive materials.

No documentation of 12 minutes per week was available.

8. According to the district, regular classroom teachers provided the following accommodations:
   a. arranged for a fellow student notetaker,
   b. allowed use of tape recorder for creative writing assignments,
   c. allowed use of calculator for math,
   d. required 50% of homework assigned to others,
   e. increased allotted time for completion of assignments,
   f. provided take home tests,
   g. provided preferential seating,
   h. assigned partners in class,
   i. provided individualized attention and counseling,
   j. met with parents private tutor to discuss useful strategies,
   k. met with previous teachers to learn about helpful strategies and
   l. met with X.S.'s mother several times to discuss progress and strategies

According to X.S's mother, none of the above was provided prior to her filing a complaint with C.D.E. and they are being provided only minimally at this time. She states that X.S. was unaware of permission to utilize a calculator and that math was the only subject in which homework expectations were modified to 50%.

III. CONCLUSIONS

1. The IEP for X.S. developed on 10/5/92 does not contain short term instructional objectives, appropriate objective criteria and evaluation procedures and schedules for determining whether the short term instructional objectives are being achieved. According to its own admission, the district did not, therefore, provide an IEP, which conforms with the regulatory requirements in 34 C.F.R. 300. 346(a).

2. According the the district, all services called for on the IEP have been and continue to be provided. According to the mother, these services have not been provided and are currently being provided minimally, if at all. It is, therefore, not possible, as part of this investigation, to determine whether the district provided the services in accordance with the IEP, due to the conflict of information and the lack of documentation and specific information on the IEP.

3. By the district's own admittance, an IEP must quickly be developed which meets the regulatory requirements.

4. It is not within the jurisdiction of CDE to decide on specific services to be provided to a student with disabilities, but rather a function of the local IEP committee of which the parents are a part. A legally constituted local IEP committee convened according to the Act, must be utilized for determination of goals, objectives and evaluation criteria and for the determination of services to meet these goals and objectives.

IV. REMEDIAL ACTIONS

1. On or before June 15, 1993, the district must facilitate an I.E.P. meeting during which the IEP is revised or newly developed in accordance with sections 34 C.F.R. 300.343 - 347. In addition, the IEP must (1) specifically address whether compensatory services are needed for X.S. due to expectations (short term objectives and evaluation criteria) not being specific during the current school year and if so, (2) the specific nature and duration of the compensatory services to be provided. This must specifically address, but not be limited to, the issue of acquisition of keyboarding skills.

2. On or before June 30, 1993, the district must submit to the Federal Complaints Coordinator a copy of the I.E.P. developed for X.S. along with a description of any compensatory services to be provided.

V. RECOMMENDATIONS

It is clear that the IEP, although specific relative to needs, lists very general goals and does not identify child centered objectives, criteria and evaluation procedures and schedules to to meet those needs. It is recommended that the district provide inservice training to their IEP facilitators on the need for specificity in I.E.P development and on the difference between modifications/service descriptors and child centered short term objectives. The Colorado Department of Education will assist with this if requested.

Dated this 28rd day of May, 1993

Cheryl M. Karstaedt by Carol [illegible]

Cheryl M. Karstaedt, Federal Complaints Coordinator

Case Number: 93.504

Status: Complaint Findings

Key Topics: Compensatory Services
Least Restrictive Environment (LRE)

Issues:

- Whether or not the district failed to provide services in the LRE specifically by placing the student on homebound services beyond a short interim period of time and by failing to determine what amount of homebound services would meet his needs.

Decision:

- The district did provide FAPE in the LRE.
- The district failed to utilize an individual planning process to determine the amount and type of homebound services to be provided.

Discussion:

- Amount and type of homebound services must be determined by an IEP committee and not by availability.

FEDERAL COMPLAINT NUMBER 93:504

AMENDED FINDINGS AND RECOMMENDATIONS

I. PRELIMINARY MATTERS

A. The complaint was received by the Federal Complaints Coordinator, Colorado Department of Education (CDE), on June 1, 1993.

B. The complaint was filed by The Legal Center representing Mr. and Mrs. D. on behalf of their son, J.D., against Jefferson County School District R-1, Dr. Lewis W. Finch, Superintendent (the district).

C. The process for receipt, investigation and resolution of the complaint is established pursuant to the authority of the Individuals With Disabilities Education Act 20 U.S.C. 1401 et. seq., (the Act), and its implementing regulations concerning state level complaint procedures, 34 C.F.R. 300.660-300.662, and Colorado State Board of Education Policy No. 1280.0.

D. The complaint was brought against the district as a recipient of federal funds under the Act. It is undisputed that the district is a program participant and receives federal funds for the purpose of providing a free appropriate public education to eligible students with disabilities under the Act.

E. J.D. is a student with disabilities eligible for services from the district under the Act.

F. The complaint was accepted for investigation based upon a determination that CDE had jurisdiction over the allegations contained in the complaint pertaining to violations of federal law and rules in a federally funded program administered by CDE.

G. The timeline within which to investigate and resolve this matter expired on July 30, 1993. Findings and Recommendations were issued on July 20, 1993. Complainants filed a Request for Reconsideration which was received on July 30, 1993 and agreed that the timeline be extended in order to consider their request.

H. The investigation of the complaint included a review of the documents submitted by the parties, telephone interviews and consideration of relevant case law and federal agency opinion letters.

II. ISSUE

A. STATEMENT OF THE ISSUE:

Whether or not the district has violated the provisions of the Act by failing to provide J.D. with a free appropriate public education (FAPE) in the least restrictive environment (LRE), specifically by:

1. placing J.D. on homebound services beyond a short interim period of time,
2. failing to determine what amount of homebound services would meet his individual needs, and
3. failing to provide educational services within the least restrictive environment.

B. RELEVANT STATUTORY AND REGULATORY CITATIONS

20 U.S.C. 1401 (16),(17),(18),(20) and (25), 1412, and 1414.

34 C.F.R. 300.2, 300.8, 300.11, 300.14, 300.17, 300.121, 300.130, 300.132, 300.180, 300.235, 300.300, 300.340, 300.346, 300.550, 300.552.

Fiscal Years 1992-1994 State Plan Under Part B of the Individuals With Disabilities Education Act, Section V.E.

C. FINDINGS

1. At all times relevant to the complaint, the district was receiving funds under the Act pursuant to an approved application for funding.

2. The funds were paid to the district, in part, based on the assurances contained within the application.

3. One of the assurances made by the district is that, in accordance with the Act, it will provide a free appropriate public education in the least restrictive environment to each eligible student with disabilities within its jurisdiction to meet the unique needs of that child. In carrying out its responsibilities, the district identified J.D. as an eligible student with disabilities and, consequently, with the participation of his parents, developed an IEP for him.

4. IEPs were developed for J.D. on 5/22/92 and 10/17/92 which delineated the special education and related services to be offered, with the anticipated duration of those services being one year.

5. On 8/17/92, Mrs. D. gave written parental consent to provide special education and related services to J.D. at Colorow Elementary.

6. On 3/12/93 an IEP review was held with an interagency committee for the purpose of revising the IEP of J.D. due to his alleged deteriorating behavior and concern over the safety of other students, adults, and J.D., himself. In addition to district personnel and Mrs. D, representatives from the Jefferson County Department of Mental Health and Jefferson County Department of Social Services were in attendance.

   a. Statements of goals including short-term instructional objectives and appropriate objective criteria, evaluation procedures and schedules which were developed on 9/22/92, were continued as part of the IEP. Goals were in the areas of math, reading, written language, peer relationships, self-awareness and responsibility.

   b. The recommended placement for appropriate education in the least restrictive environment was "Day Treatment" for 360 minutes per day, described as "(a) specialized therapeutic setting to address his social, emotional, behavioral and academic needs; (b) consultation regarding his motor needs; (c)support for individual, small group and family therapy; consultation nurse/with family neurologist."

c. The IEP also indicates: "Continue current program until Day Treatment decisions are made. If J. hurts another child he will be suspended. At that time, Homebound services will be requested as an interim program only."

7. Various interpretations have been given by members of the IEP team as to why placement into day treatment did not occur but rather placement in the Colorow SIED program continued.

   a. According to Mrs. D., there is a long waiting list for placement into day treatment so the district did not pursue this. In her opinion the district simply "wanted him out of there" but was not willing to explore specific day treatment alternatives unless Mr. and Mrs. D. provided written parental consent for day treatment, which they were unwilling to do without knowledge of the specific placement and assurance that this would be an appropriate placement for J. Mrs. D. indicated that initially the district expected the parents to provide funding for treatment and it would provide funding only for education. Mrs. D. indicated that Social Services was not involved.

   b. According to the district, a representative from Jefferson County Department of Social Services was present at the meeting and agreed with placement into day treatment. She indicated that she would immediately begin looking for an opening in a day treatment facility which would match J.D's age and needs. The day treatment program available from the district had not been appropriate for J.D. The social services representative requested that Mr. and Mrs. D . sign a release of information so that Social Services could have a copy of J.D.'s IEP and other related documents which would provide information regarding his needs. According to the district, Mr. D. refused to sign the release of information, indicating that he was not going to put J.D. into one more new program until the district figured out what was wrong with him. The principal of Colorow subsequently agreed to continued placement there with the condition of possible suspension should safety of others be jeopardized. The district agreed to provide and pay for additional assessments, including medical assessments, at the parents' request ,even though the district felt the current assessment information was adequate.

8. It appears that the district, in conjunction with a social services representative, undertook to secure a placement for J.D. that carried out what was agreed to by the IEP team, including the parents. It was unable to do so because complainant refused to permit social services access to certain education records. Complainants have the legal right to refuse to release the records. The district, on the other hand, could continue to pursue the placement and, indeed, make a placement, with appropriate notice to the parents.

9. J.D. was suspended from school for three days: March 18, 19 and 29. (The school district was not in session because of spring break from March 20 through 28.)

10. On 3/29/93, although not required by law, Mrs. D provided written parental consent for Homebound Services, which had been called for on the IEP.

11. Homebound services provided by a certified special education teacher were initiated on 3/31/93 and continued through 6/2/93. Subjects for homebound instruction included math, reading and language arts. Services were provided 4 times per week for a total of 5 hours, according to district policy. J. was counted as truant for five days of homebound instruction. The district indicates this was due to his walking out of the sessions. The homebound teacher reported his walking out ten times and not showing up one time. Mrs. D. indicates this was because the homebound teacher asked J. to leave due to his use of profanity. The parents met with the homebound teacher once during this period to discuss ways of making this a more positive experience for J.

12. The IEP team did not appropriately determine the amount and type of homebound services to be provided to J.D. should the homebound option contained in the IEP need to be implemented, as it was.

13. J.D. may not have had available to him a FAPE for the period of time from 3/30/93 to 6/2/93. However, J.D. did not avail himself of the services that were provided.

14. On 4/14/93, the district requested financial assistance from the Colorado Department of Education to provide additional assessment of J.'s medical/neurological/psychological status through Children's Hospital. That request was granted. Teacher questionnaires provided by Children's hospital were completed and returned to the Child Development Unit on 5/6/93. Requested family data was returned on 5/21/93. Subsequently, the designated physician arranged for appointments on 7/16 for "psych" and 9/22 for "med history/neuro/developmental". The reason for this latter late appointment was the physician's personal schedule out of the country in August. In addition a follow up to the neurological evaluation on 11/23/92 is scheduled for 10/4/93.

III. CONCLUSIONS

A. The district did provide a free appropriate public education as it relates to the least restrictive environment and therefore, did not violate the Act in this regard.

B. The district did violate the Act and failed to provide J. D. with a free appropriate public education when it failed to utilize an individual planning process to determine the amount and type of homebound services to be provided.

IV. REMEDIAL ACTIONS

A. Prior to the commencement of the 1993 school year, the district will hold an IEP meeting to determine the placement for J.D. for the 1993-1994 school year. In addition to developing an IEP for J.D., the IEP team will specifically determine, based on J.D.'s needs, whether or not he should receive compensatory services for the period of time commencing in March 1993 and continuing to the end of the 1992-1993 school year when he did not receive services based on an individual planning process. These compensatory services would be in addition to the services he is to receive for the 1993-1994 school year. If the IEP team decides that services should be provided, it shall determine the nature and extent of the services.

B. The district will hold an additional IEP meeting after receiving the completed assessment information from Children's Hospital to determine what changes, if any, must be made in the special education and related services provided to J.D. as a result of the additional assessment information.

C. The district will forward to CDE on or before September 15, 1993 documentation that it has complied with the terms of paragraph A above.

D. The district will forward documentation to CDE on or before January 4, 1994 that it has complied with the terms of paragraph B above.

Dated this 11th day of August, 1993

Cheryl M Karstaedt

Cheryl M. Karstaedt, Federal Complaints Coordinator

Case Number: 93.505

Status:	Complaint Findings
Key Topics:	Free Appropriate Public Education (FAPE) Related Services Individualized Educational Plan (IEP)

Issues:

- Whether or not the district failed to provide the related services called for on the IEP, specifically the wearing of a helmet and administration of eyedrops.
- Whether or not the district failed to provide instructional services in accordance with the IEP, specifically integration into the first grade regular education classroom.

Decision:

- The district did not violate the by failing to provide related services.
- The district did fail to reconvene an IEP committee to determine the specific amount of services to be provided and then failed to provide those services.

Discussion:

- Wearing of a helmet and administering of eyedrops, while mentioned in the IEP, were not related services governed by the IEP.
- "Mainstreaming as appropriate" and "to be determined" does not meet the requirement for IEPs to be specific as to amount of service.

FEDERAL COMPLAINT NUMBER 93:505

FINDINGS AND RECOMMENDATIONS

I. PRELIMINARY MATTERS

A. The complaint was received by the Federal Complaints Coordinator, Colorado Department of Education (CDE), on June 1, 1993.

B. The complaint was filed by Mr. and Mrs. J. on behalf of their son, E.J., against Pueblo School District No. 60, Dr. Leonard Burns, Superintendent, and Ms. Pam Jacobsen, Special Education Director, (the district).

C. The process for receipt, investigation and resolution of the complaint is established pursuant to the authority of the Individuals With Disabilities Education Act 20 U.S.C. 1401 et. seq., (the Act), and its implementing regulations concerning state level complaint procedures, 34 C.F.R. 300.660-300.662, and Colorado State Board of Education Policy No. 1280.0.

D. The complaint was brought against the district as a recipient of federal funds under the Act. It is undisputed that the district is a program participant and receives federal funds for the purpose of providing a free appropriate public education to eligible students with disabilities under the Act.

E. E.J. is a student with disabilities eligible for services from the district under the Act.

F. The complaint was accepted, in part, for investigation based upon a determination that CDE had jurisdiction over two of the allegations contained in the complaint pertaining to violations of federal law and rules in a federally funded program administered by CDE.

G. The timeline within which to investigate and resolve this matter expires on July 30, 1993.

H. The investigation of the complaint included a review of the documents submitted by the parties, telephone interviews and consideration of relevant case law and federal agency opinion letters.

II. ISSUES

Issue Number One

A. STATEMENT OF THE ISSUE:

Whether or not the district has violated the provisions of the Act by failing to provide E.J. with a free appropriate public education, specifically by not providing the related services called for on his individualized education program(IEP), relating to the wearing of a helmet and the administration of eyedrops.

B. RELEVANT STATUTORY AND REGULATORY CITATIONS

20 U.S.C. 1401 (16),(17),(18),(20) and (25), 1412, and 1414.

34 C.F.R. 300.2, 300.5, 300.6, 300.8, 300.14, 300.16, 300.17, 300.121, 300.130, 300.180, 300.235, 300.300, 300.308, 300.340, 300.342, and 300.346.

Fiscal Years 1992-1994 State Plan Under Part B of the Individuals With Disabilities Education Act, Section V.E.

C. FINDINGS

1. At all times relevant to the complaint, the district was receiving funds under the Act pursuant to an approved application for funding.

2. The funds were paid to the district, in part, based on the assurances contained within the application.

3. One of the assurances made by the district is that, in accordance with the Act, it will provide a free appropriate public education, including special education and related services, to each eligible student with disabilities within its jurisdiction to meet the unique needs of that child. In carrying out its responsibilities, the district identified E.J. as an eligible student with disabilities and, consequently, with the participation of his parents, developed an IEP for him.

4. Related services are identified on a child's IEP and must be provided if they are required to assist a child with a disability to benefit from special education. Related services may include transportation and developmental, corrective or other supported services.

5. Assistive technology devices are identified on a child's IEP and may include any item, piece of equipment, or product system that is used to increase, maintain, or improve the functional capabilities of children with disabilities.

6. An IEP staffing was held for E.J. on May 26, 1993. It is noted on the IEP developed on that date that E.J. was undergoing surgery and would need to wear a helmet during physical education and physical therapy upon his return to school in the fall.

7. E.J. returned to school in the fall and brought his helmet with him. He wore the helmet as mentioned on the IEP. At some point during the school year, E.J. stopped bringing the helmet to school and the school assumed that he no longer needed to wear it.

8. In April, E.J. sustained a bruise to his head when he fell off a scooter board during P.E.. He was not wearing a helmet at the time because he had not brought it to school.

9. Subsequent to E.J.'s accident, a case conference was convened on April 15, 1993. An addendum to the IEP, signed by Mrs. J. indicates that she wished E.J. to wear his helmet during any activities in the classroom or the gym where he might fall. Mrs. J agreed to provide the helmet which was to be kept at school.

10. The district believed from information provided by Mrs. J. that E.J.'s doctor wanted him to wear the helmet . However, Mrs. J. did not provide written confirmation of this nor did she allow the district to contact the doctor directly.

11. On April 21, 1993 a planning conference was held between Mrs. J. and Ms. Jacobsen where an addendum was created for E.J.'s IEP that outlines when he must wear his helmet. It indicates that an extra helmet was to be kept at school for times when E.J. does not have his on when he gets there.

12. While not as clearly stated as it could be, it does not appear that the provision of a helmet for E.J. was to be a related service that the district would provide to E.J. because he required it to benefit from his special education. If, at some future time, the IEP team decided that the helmet was required in order for E.J. to benefit from his special education, then the district would have to provide it. However, such is not currently the case. Further, Mrs. J. has agreed

to provide an extra helmet for the school to keep on hand apparently in case E.J. does not bring his from home.

13. Furthermore, there is no showing that the helmet is an assistive technology device used to increase, maintain or improve E.J.'s functional capabilities.

14. It appears that the use of the helmet stems from E.J.'s medical needs and not his special education needs.

15. The IEP developed for E.J. on May 26, 1993 identified one of his needs as "eye drops every 30 min".

16. The district has a policy adopted by its board of education and a procedure that requires a form to be filled out and signed by a physician before medication may be dispensed to a student. This policy was revised in May 1992.

17. On August 29, 1990 under a prior policy, Mrs. J. provided the requisite form to the district and the district administered eyedrops to E.J.

18. At the IEP meeting in October 1992, Mrs. J. was provided with the new form and asked to have it filled out so that the district could continue to administer eyedrops to E.J. Mrs. J. was told that the eyedrops would be given for a short time as she assured the district she would return the form with the required physician signatures. In December a note was written reminding Mrs. J. to return the form. Repeated requests were made after that time to have the appropriately filled out form returned to the school.

19. On May 20, 1993, Mrs. J. returned the form appropriately filled out that would allow the district to administer the eyedrops according to district policy. On May 21, 1993, Mrs. J. provided a second form that requested administration of the eyedrops in a manner different than directed on the form filed the day before.

20. There is no showing that the administration of the eyedrops was a related service that should be handled by the district in a manner different than that required by its general policy for administering medication to any student.

Issue Number Two

A. STATEMENT OF THE ISSUE

Whether or not the district violated the provisions of the act by failing to provide E.J. with a free appropriate public education, specifically by not providing instructional services in accordance with the IEP which called for some service to be provided in the first grade regular education classroom.

B. RELEVANT STATUTORY AND REGULATORY CITATIONS

20 U.S.C. 1401 (16),(18), and (20), 1412, and 1414.

34 C.F.R. 300.2, 300.8, 300.14, 300.17, 300.121, 300.130, 300.180, 300.235, 300.300, 300.340, 300.342, and 300.346.

Fiscal Years 1992-1994 State Plan Under Part B of the Individuals With Disabilities Education Act, Section V.E.

C. FINDINGS

1. Paragraphs 1 through 3 of the Findings under Issue Number One are incorporated herein by reference.

2. On the IEP document created as a result of the staffing on June 6, 1992, mention is made several times of the need for E.J. to receive some service in the first grade classroom. On a page designated "Parent Permission for Special Education Services" under a section about service delivery, it states as follows:

   Mainstream into 1st gr- then 2nd gr. classrooms as appropriate.
   Also mainstream into 5th gr. approx. _____ hours per week.

   Additionally, on two pages describing needs and characteristics of service, it states:

   Mainstream-5th grade classroom for social skill development-
   1st gr. classroom for readiness skill development.
   Interaction with mainstream students-begin with 1st grade classroom.

   Further, on a page specifically signed by Mrs. J., the IEP says:

   Schedule for length of time for mainstream classes will be determined the 1st/2nd week of school.

3. A planning conference was not held for E.J. until October 21, 1992. At that time E.J. was not receiving services in the first grade classroom as called for on the IEP. The district asserts that the matter was discussed at the meeting, but admits that there is no documentation of the discussion.

4. Mrs. J. called the district at the end of November to inquire as to why E.J. was not yet receiving services in the 1st grade classroom. The district responded by providing the services beginning sometime in December.

5. E.J. was entitled, by the terms of the IEP, to receive some services in the 1st grade classroom from the beginning of the 1992 school year until services were begun in December. Unfortunately, because the IEP states that mainstreaming would be provided "as appropriate" and on a schedule to "be determined", there is no way to conclude how much service was not provided.

III. CONCLUSIONS

A. The district did not violate the Act in regard to E.J.'s wearing of his helmet during certain activities. Neither did the district violate the Act when it stopped administering eyedrops to E.J. While mentioned in the IEP, these activities were not related services governed by the student's IEP.

B. The district did violate the Act when it failed to reconvene an IEP staffing in the fall of 1992 to determine the specific amount of services to be provided to E.J. in the 1st grade classroom, as specifically called for on his IEP, and then to provide those services.

IV. REMEDIAL ACTIONS

A. Prior to the commencement of the 1993 school year, the district will hold an IEP meeting to discuss the extent of the services to be provided in the regular classroom. The nature and extent of the services will be specifically stated on the IEP. The IEP team will also determine whether or not E.J. should receive additional services in the regular classroom during the 1993 school year because of the failure of the district to provide those services for several months during the last school year. The provision of services in the regular education classroom should be age appropriate.

B. The district will forward to CDE on or before September 15, 1993 documentation that it has complied with the terms of paragraph A above.

Dated this 1st day of July, 1993

Cheryl M Karstaedt

Cheryl M. Karstaedt, Federal Complaints Coordinator

Case Number: 93.507

Status: Complaint Findings

Key Topics:
Procedural Safeguards (Access to Records)
Free Appropriate Public Education (FAPE)
Related Services (Transportation)
Individualized Educational Plan (IEP)

Issues:

- Whether or not the district failed to provide transportation as a related service which included consultation and training to bus drivers.
- Whether or not the district failed to provide an IEP which included short term objectives, criteria and evaluation procedures and schedules.
- Whether or not the district failed to provide special education services and placement based on an IEP.
- Whether or not the district failed to provide the parents with procedural safeguards by not permitting access to records nor a copy of the IEP without unnecessary delay.

Decision:

- The district did not violate the act regarding any of the issues.

Discussion:

- District provided documentation relating to all issues.

FEDERAL COMPLAINT NUMBER 93:507

FINDINGS AND RECOMMENDATIONS

I. PRELIMINARY MATTERS

A. The complaint was received by the Federal Complaints Coordinator, Colorado Department of Education (CDE), on August 16, 1993.

B. The complaint was filed by Mr. A. and Mrs. R. H. on behalf of their son, L. H., against Denver County #1 School District, Dr. Evie G. Dennis, Superintendent and Mr. John Leslie, Special Education Director (the district).

C. The process for receipt, investigation and resolution of the complaint is established pursuant to the authority of the Individuals With Disabilities Education Act 20 U.S.C. 1401 et. seq., (the Act), and its implementing regulations concerning state level complaint procedures, 34 C.F.R. 300.660-300.662, and Colorado State Board of Education Policy No. 1280.0.

D. The complaint was brought against the district as a recipient of federal funds under the Act. It is undisputed that the district is a program participant and receives federal funds for the purpose of providing a free appropriate public education to eligible students with disabilities under the Act.

E. L. H. is a student with disabilities eligible for services from the district under the Act.

F. The complaint was accepted, in part, for investigation based upon a determination that CDE had jurisdiction over some of the allegations contained in the complaint pertaining to violations of federal law and rules in a federally funded program administered by CDE.

G. The timeline within which to investigate and resolve this matter expires on October 15, 1993.

H. The investigation of the complaint included a review of the documents submitted by the parties, interviews with persons named in those documents or who had information relevant to the complaint and consideration of relevant case law and federal agency opinion letters.

II. ISSUES

Issue Number One

A. STATEMENT OF THE ISSUE:

Whether or not the district has violated the provisions of the Act by failing to provide L. H. with a free appropriate public education, specifically by:

(a) not providing transportation as a related service identified on the IEP,

(b) failing to provide consultation and training to bus drivers,

(c) failing to provide an IEP which includes short-term instructional objectives with appropriate objective criteria and evaluation procedures and schedules for determining whether the short term instructional objectives are being achieved, and

(d) failing to provide special education services and placement based on an IEP.

B. RELEVANT STATUTORY AND REGULATORY CITATIONS

20 U.S.C. 1401 (16), (17), (18), and (20) and 1414.

34 C.F.R. 300.2, 300.8, 300.14, 300.16, 300.17, 300.121, 300.130, 300.180, 300.235, 300.300, 300.340, 300.343, and 300.346.

Fiscal Years 1992-1994 State Plan Under Part B of the Individuals With Disabilities Education Act, Section V.E.

C. FINDINGS

1. At all times relevant to the complaint, the district was receiving funds under the Act pursuant to an approved application for funding.
2. The funds were paid to the district, in part, based on the assurances contained within the application.
3. One of the assurances made by the district is that, in accordance with the Act, it will provide a free appropriate public education, including special education and related services, to each eligible student with disabilities within its jurisdiction to meet the unique needs of that child. In carrying out its responsibilities, the district identified L.H. as an eligible student with disabilities and, consequently, with the participation of his parents, developed an IEP for him.
4. Statements of annual goals, including short-term instructional objectives with appropriate objective criteria and evaluation procedures and schedules for determining whether the short term instructional objectives are being achieved are to be identified on a child's IEP.
5. Specific special education services to be provided to the child are to be identified on a child's IEP and must be provided.
6. Related services are identified on a child's IEP and must be provided if they are required to assist a child with a disability to benefit from special education. Related services may include transportation and developmental, corrective or other supported services.
7. IEP meetings were held for L.H. on March 12, 1992 and December 11, 1992. It is noted on the IEPs developed on those dates that the parents were in attendance as indicated by their signatures.

8. The IEP dated 3/12/92 indicates the following short term objectives for the time period from 3/24/92 to 3/24/93:

   Maintain eye contact with conversational partner or small group in classroom 60% time
   Maintain a given topic over the course of 5-7 turns with conversational partner without switching topic 60% time
   Ask appropriate or relevant questions in a small group or individual activity 50% time
   Patiently wait for his turn in the conversation and not interrupt a peer or adult in the classroom 50% time
   Correctly produce the / / phoneme at the syllable and word level in all positions 60% time
   Correctly produce the / / phoneme in initial position in words 50% time
   Increase reading skills from 1.7 gr. level to 2.3 gr. level as measured by CRT.
   Increase math skills from 2.2 gr. level to 2.8 gr. level as measured by CRT
   Increase written language skills from 1.0 gr. level to 1.5 gr. level
   Decrease hitting, spitting peers and adults from average of 5 times a week to 1 or less times per week
   Increase waiting for needs to be met from 15 seconds to 60 seconds
   Increase responsibility for own actions from 0 times to 3 times a week
   Increase participation in class group activities and make contributions relevant to the topic from 1 to 3 times per day
   Increase sharing playground equipment without getting angry from 0 to 3 times a week

9. The short term objectives (above) written as part of the IEP dated 3/12/92, include means of evaluation and date begun. There is no indication of date met or comments.

10. The IEP dated 3/12/92 indicates the following services:

    Self contained ED services by a special educator 360 minutes a day, 5 times a week.

    Itinerant speech/language services 30 minutes a day, 2 times a week.

    It does not indicate the need for transportation as a related service.

11. The IEP dated 12/11/92 indicates that some of the short term objectives written at the 3/12/92 IEP were met and that some will be continued as follows (see above):

    Maintain eye contact... - *met 12/92, when motivated to talk with a conversational partner*
    Maintain a given topic... - *continue, thinking will interfere with ability to maintain a topic*
    Ask appropriate or relevant questions... - *will not currently ask a question; uses statements*
    Patiently wait for his turn in the conversation... - *with adult prompt; continue*
    Correctly produce the / / phoneme... - *not without prompt*
    Correctly produce the / / phoneme... - *continue. He is getting closer, not as nasalized*
    Increase reading skills... - *unable to give CRT; functional level is 2.0*
    Increase math skills... - *met this goal in computational area but not application problems*
    Increase written language skills... - *met 11/92*

Decrease hitting, spitting peers and adults... - *met 11/92, continue monitoring*
Increase waiting for needs to be met... - *met 11/92, continue and raise criterion*
Increase responsibility for own actions...- *met 11/92 but continue raising criterion*
Increase participation in class group activities and make contributions relevant to the topic...- *met 11/92*
Increase sharing playground equipment without getting angry ...- *met 11/92. L.has begun engaging classmates on the playground*

12. The IEP dated 12/11/92 lists eight additional short term objectives in academics, domain areas and social skills, two additional short term objectives in articulation and two in language for the period from 12/11/92 to 12/11/93. All objectives include criterion for mastery.

13. The IEP dated 12/11/92 indicates the following services:

Self contained ED services by a special educator 360 minutes a day, 5 times a week.

Resource speech/language services 30 minutes a day, 2 times a week.

Extended School Year Services

Alternative transportation recommended: curb to curb

14. A general addendum to the IEP dated 1/4/93 indicates that a meeting was held to review and update L.'s educational program and transportation. The addendum indicates that Mr. and Mrs. H. were present at the meeting. The addendum contains the following information:

L. has had an escalation of inappropriate behaviors in the classroom and on the bus.

(Betty) related that the bus drivers met with Jean on the 17th of December to ask questions and information on how to help L. understand bus rules and expectations

In Route folder -- picture of L. and index card with important data. Mary offered Maggie's assistance to help L. with transitions as needed. Cynthia suggested to Mike that all paras and bus drivers be inserviced, perhaps on January 15th. Focus on calming techniques.

15. Short term instructional objectives with appropriate objective criteria and evaluation procedures and schedules were written for L.H. for the time period from 3/12/92 through 12/11/93. Objectives written on 3/12/92 IEP were either completed or continued as part of the 12/11/92 IEP, new objectives were added and evaluation criteria and schedules were provided and utilized.

16. According to written communication from the district's Director of Special Education and a telephone interview with the district's Transportation Manager, L. has been provided curb to curb transportation since January, 1990. All agree that there was one day in December of 1992 when L. was not brought to school on the bus. The parents allege the bus never stopped at their home that day. The bus driver states that he did stop, but L. never came out of the house.

17. Transportation as a related service was provided to L.H. in accordance with the 12/11/92 IEP. Even if transportation was not provided for one day as alleged by the parents, that action would not constitute a denial of a free appropriate public education.

18. According to written communication from the district's Director of Special Education, (a) Maggie Baldwin trained bus drivers and paraprofessionals while accompanying L. during his bus ride from home to school on January 14 and February 19, 1993, and (b) the staff at Doull Elementary provided strategies that would be helpful for L.'s successful inclusion during a bus ride which were included in the route folder for access by all bus staff.

19. Although there are no specific statements as to consultation for and training of bus drivers for L.H. on either the 3/12/92 IEP or the 2/11/92 IEPs, such consultation and training were provided.

20. According to a telephone interview with the district's record coordinator, L.H. was provided full time special education services in a self contained special education classroom beginning 1/22/92 at Doull Elementary and terminating at the end of the school year. During that time he also received speech/language support services 30 minutes per day, two days per week. L.H. is currently being provided self contained special education services and speech language support services at Fairmont, in accordance with the 12/11/92 IEP.

21. Related and instructional services were provided and are currently being provided in accordance with the IEPs dated 3/12/92 and 12/11/92.

22. According to the district, L.H. was not provided with extended school year services, as Mr. H. declined those services due to a change in service providers. Mr. H. indicates also that those services were declined.

Issue Number Two

A. STATEMENT OF THE ISSUE

Whether or not the district violated the provisions of the act by failing to provide Mr. and Mrs. H. procedural safeguards by

(a) not permitting parents to inspect and review educational records and

(b) not permitting parents to review or obtain a copy of the IEP developed May 19, 1993 without unnecessary delay.

B. RELEVANT STATUTORY AND REGULATORY CITATIONS

20 U.S.C. 1401 (16), (18), and (20), 1412(2)(D), 1414, and 1417(c)

34 C.F.R. 300.2, 300.8, 300.14, 300.17, 300.121, 300.129, 300.130, 300.180, 300.221 and 300.560-300.566

C. FINDINGS

1. Mary Davis, principal of Steele Elementary School does not recall Mr. or Mrs. H. requesting to review L.'s records during the fall of 1991. According to Mrs. Davis, parents are allowed to review records in the office area of the building and can receive copies of school generated reports. Reports prepared by other departments within the district can be obtained from the specific department.

2. The district and the complainants offer differing information on whether Mr. and Mrs. H. were permitted to inspect and review educational records. This investigation is not able to determine the facts in this situation; however, it is able to determine that the school district's and building's procedures for allowing the inspection and review of educational records is in compliance with federal regulations.

3. A planning meeting was held 5/19/93, at Bradley Elementary School to explore strategies to facilitate L.'s transition from Doull to Bradley. The IEP dated 12/11/92 was still in effect at that time and thought to be appropriate. According to the district, Cynthia Rose kept minutes of the transition planning meeting on a lap top computer and mailed a copy of the minutes to Mr. and Mrs. H. in a timely fashion. Also, according to the district, when it came to the attention of the Special Education Department that the parents had not received their copy, Mary Franza contacted Mr. H. by telephone and offered to deliver a copy to him at home. The district reported that Mr. H. said they would not be at home, but to leave a copy in the letter slot into the house. Mary did so the morning of 8/11/93.

4. The district did not develop an IEP on 5/19/93 but rather a plan to change placement to another building. The parents were provided a copy of the plan.

III. CONCLUSIONS

A. The district did not violate the Act in regard to providing L.H. with a free appropriate public education as transportation was provided as a related service, consultation and training were provided to bus drivers, IEPs did include short term instructional objectives with appropriate objective criteria and evaluation procedures and schedules, and the special education services listed on the IEP were provided.

B. The district did not violate the Act by failing to provide procedural safeguards as parents were permitted to inspect and review educational records and were given copies of the IEPs.

IV. REMEDIAL ACTIONS

None

Dated this 5th day of October, 1993

Cheryl M. Karstaedt, Federal Complaints Coordinator

Case Number: 93.508

Status: Complaint Findings

Key Topics: Extended School Year (ESY)

Issues:

- Whether or not the district failed to provide specific ESY services including transition into ESY, consultation and training to ESY staff, speech-language, OT and PT support services, and documentation of progress.

Decision:

- The district did not violate the Act.

Discussion:

- Services listed on ESY IEP were provided. Goals for ESY pertained to maintenance of skills and educational benefits accrued during the regular school year, not to progress toward new skills or educational benefits.

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FEDERAL COMPLAINT NUMBER 93:508

FINDINGS AND RECOMMENDATIONS

I. PRELIMINARY MATTERS

A. The complaint was received by the Federal Complaints Coordinator, Colorado Department of Education (CDE), on August 12, 1993.

B. The complaint was filed by Mr. and Mrs. R. H. on behalf of their son, K.H., against Weld 6 School District, Mr. John Pacheco, Acting Superintendent and Dr. Bruce Messinger, Director of Pupil Services (the district).

C. The process for receipt, investigation and resolution of the complaint is established pursuant to the authority of the Individuals With Disabilities Education Act 20 U.S.C. 1401 et. seq., (the Act), and its implementing regulations concerning state level complaint procedures, 34 C.F.R. 300.660-300.662, and Colorado State Board of Education Policy No. 1280.0.

D. The complaint was brought against the district as a recipient of federal funds under the Act. It is undisputed that the district is a program participant and receives federal funds for the purpose of providing a free appropriate public education to eligible students with disabilities under the Act.

E. R. H. is a student with disabilities eligible for services from the district under the Act.

F. The complaint was accepted for investigation based upon a determination that CDE had jurisdiction over the allegations contained in the complaint pertaining to violations of federal law and rules in a federally funded program administered by CDE.

G. The timeline within which to investigate and resolve this matter expires on October 11, 1993.

H. The investigation of the complaint included a review of the documents submitted by the parties, interviews with persons named in those documents or who had information relevant to the complaint and consideration of relevant case law and federal agency opinion letters.

II. ISSUE

A. STATEMENT OF THE ISSUE:

Whether or not the district has violated the provisions of the Act by failing to provide R.H. with Extended School Year (ESY) Services as part of a free appropriate public education, specifically by:

(a) failing to provide the transition services from the regular school year to ESY, as designated on the IEP,

(b) failing to provide consultation and training to the ESY staff person, as designated on the IEP.

(c) failing to provide the support services, specifically speech-language, occupational therapy and physical therapy, as designated on the IEP and

(d) failing to provide documentation as to the progress toward goals and objectives, as designated on the IEP.

B. RELEVANT STATUTORY AND REGULATORY CITATIONS

20 U.S.C. 1401 (16), (18), (20) and 1414.

34 C.F.R. 300.2, 300.8, 300.11, 300.14, 300.17, 300.121, 300.130, 300.180, 300.235, 300.300, 300.340, and 300.346.

Fiscal Years 1992-1994 State Plan Under Part B of the Individuals With Disabilities Education Act, Section V.E. and Appendix

C. FINDINGS

1. At all times relevant to the complaint, the district was receiving funds under the Act pursuant to an approved application for funding.

2. The funds were paid to the district, in part, based on the assurances contained within the application.

3. One of the assurances made by the district is that, in accordance with the Act, it will provide a free appropriate public education, including special education and related services, to each eligible student with disabilities within its jurisdiction to meet the unique needs of that child. In carrying out its responsibilities, the district identified R.H. as an eligible student with disabilities and, consequently, with the participation of his parents, developed an IEP for him.

4. Specific special education instructional and related services to be provided to the child are to be identified on a child's IEP and must be provided.

5. Related services are identified on a child's IEP and must be provided if they are required to assist a child with a disability to benefit from special education. Related services may include transportation and developmental, corrective or other supported services.

6. A student with disabilities under the Act is entitled to an educational program in excess of the traditional academic year if regression caused by interruption in educational programming, together with the student's limited recoupment capacity, would significantly jeopardize the benefits accrued to the student during the school year.

7. The applicable legal standard to use in determining a student's eligibility for ESY services is whether the benefits accrued to the child during the regular school year will be significantly jeopardized if the student is not provided with an educational program during the summer months.

8. Goals for ESY services and the purpose of ESY instructional and related services must pertain to the maintenance of skills and educational benefits accrued during the regular school year, not to progress toward new skills or educational benefits.

9. An undated IEP was developed for K.H. for the 1992-93 school year. Goal areas on that IEP appear to include attention to task; independent tricycle riding; strength, balance, coordination; self help areas of dressing, eating and toileting; social interaction and communication. Instructional services identified were full time "M/H". Related services identified were "O.T. Adaptive P.E." one hour per week, consultive "S/L" and "P.T." for an unspecified amount of time.

10. An IEP Addendum for ESY was developed on 5/12/93. The addendum states that ESY is required to prevent significant regression in the areas of "communication - especially the use of facilitated media, gross and fine motor - especially focused on the leisure, recreation and self-help areas, and peer interactions - stable, consistent peer and service provider group". The ESY Service Plan identified was for 9 weeks, 4 partial days a week. No services, service providers or time is listed. Other information on the ESY addendum includes:
"It is important that summer staff meet and familiarize themselves with K. and his services before ESY services begin."
"Characteristics of services: 1. inclusive peer group (typical kids), 2. transitional meeting training with school/home/CDSI".
"Equipment: communicator, tricycle, playground equipment, computers, cubed chairs".
"Close supervision/monitoring to keep safe".
"Dispense medication as needed".

11. According to the district, it contracted with Centennial Development Services, Inc. (CDSI) where K. had received after-school day care during the school year, to provide ESY services.

12. According to the district, transitional services were provided by Ms. Laura Decker, a speech and language pathologist with specialized training in facilitated communication, who met with CDSI staff members assigned to K. and trained them on the use of the facilitated communication device used by them. Also, the district states that transitional services were provided by Ms. Julie Claeys, K.'s teacher during the regular school year. She selected computer programs which she believed were appropriate to maintain his cognitive growth during the summer.

13. According to the district, Ms. Julie Claeys met directly with the staff providing services to K. to familiarize them with the computer and the programs and to discuss how best to work with them. Also Ms. Marilyn Minors, a certified teacher and pupil services coordinator had regular contact with CDSI.

14. Ms. Laura Decker stated that she was asked to provide inservice on facilitated communication to the team working with K. at CDSI. She provided one hour of inservice to K's main teacher; however the other teacher was not able to be there. The main teacher was to call her back if she had any questions, however, she never called.

15. Ms. Julie Claeys stated that she provided 45 minutes of inservice to the leader and assistant for K.'s ESY program at CDSI. She gave them information on facilitated communication and K.'s IEP goals and objectives which were to be maintained. She said that both persons felt like they already knew K. due to his having received services there the summer before and after school during the year.

16. Ms. Marilyn Minors indicated that she had frequent conversations with Margaret Edwards at CDSI and visited the program several times during the summer. Her observation was that the staff worked well with K., that he was very much a part of things and well taken care of.

17. Based on the information provided by the district and that obtained from the above three interviews, the district did provide consultation and training to the ESY staff so that they would be familiar with K. and his services before ESY services began.

18. No specific services or service providers, such as speech-language, occupational therapy and physical therapy, are designated on the ESY addendum.

19. No specific goals and objectives are designated on the ESY addendum. It states that ESY is required to prevent significant regression in the areas of "communication - especially the use of facilitated media, gross and fine motor - especially focused on the leisure, recreation and self-help areas, and stable, consistent peer and service provider group". The specific goal for the ESY program ties directly to the maintenance of skills and benefits accrued in the IEP objectives under each of these areas. Specifically then, the skills learned and benefits accrued in the following areas were to have been maintained: single word responses to questions, riding a tricycle, ball hitting, kicking and catching, walking on balance beam, independent use of playground equipment, zipping and snapping pants, pulling on and off shirt, pants and socks, and putting on shoes. This was done.

III. CONCLUSIONS

A. The district did not violate the Act in regard to providing R.H. with the following ESY services as part of a free appropriate public education: transition services from the regular school year to ESY and consultation and training to the ESY staff person, as these were provided.

B. The district did not violate the Act by failing to provide speech-language, occupational therapy and physical therapy, as these specific services were not designated on the IEP to be provided during the summer.

C. The district did not violate the Act by failing to provide documentation toward goals and objectives. Specific goals and objectives were not written for the ESY program as the goal for ESY is the maintenance of skills and benefits accrued during the school year. There was sufficient reference in the ESY addendum back to the IEP goals, and information about the IEP goals and objectives was provided to the ESY CDSI staff.

IV. REMEDIAL ACTIONS

None.

Dated this 11th day of October, 1993

Cheryl M Karstaedt
Cheryl M. Karstaedt, Federal Complaints Coordinator

Case Number: 93.510

Status: Complaint Findings

Key Topics: Related Services (Feeding)

Issues:

- Whether or not the district failed to provide feeding services called for on an IEP.

Decision:

- The district did not violate the Act.

Discussion:

- Feeding services were not listed as a related service. The district recommended further evaluation of feeding needs for safety and district proposed reasonable alternatives until evaluation could be done.

FEDERAL COMPLAINT NUMBER 93:510

FINDINGS AND RECOMMENDATIONS

I. PRELIMINARY MATTERS

A. The complaint was received by the Federal Complaints Coordinator, Colorado Department of Education (CDE), on September 27, 1993.

B. The complaint was filed by Ms. L.J on behalf of her daughter, M.J., against Englewood Schools, Dr. Roscoe Davidson, Superintendent and Mrs. Joan E. Diedrich, Director of Special Education (the district).

C. The process for receipt, investigation and resolution of the complaint is established pursuant to the authority of the Individuals With Disabilities Education Act 20 U.S.C. 1401 et. seq., (the Act), and its implementing regulations concerning state level complaint procedures, 34 C.F.R. 300.660-300.662, and Colorado State Board of Education Policy No. 1280.0.

D. The complaint was brought against the district as a recipient of federal funds under the Act. It is undisputed that the district is a program participant and receives federal funds for the purpose of providing a free appropriate public education to eligible students with disabilities under the Act.

E. L.J. is a student with disabilities eligible for services from the district under the Act.

F. The complaint was accepted for investigation based upon a determination that CDE had jurisdiction over the allegations contained in the complaint pertaining to violations of federal law and rules in a federally funded program administered by CDE.

G The timeline within which to investigate and resolve this matter expires on November 29, 1993.

H. The investigation of the complaint included a review of the documents submitted by the parties, interviews with persons named in those documents or who had information relevant to the complaint and consideration of relevant case law and federal agency opinion letters.

II. ISSUE

A. STATEMENT OF THE ISSUE:

Whether or not the district has violated the provisions of the Act by failing to provide feeding services to M. J. as called for on her individual educational program ("IEP").

B. RELEVANT STATUTORY AND REGULATORY CITATIONS

20 U.S.C. 1401 (16), (17), (18), (20) and 1414.

34 C.F.R. 300.2, 300.8, 300.11, 300.14, 300.16, 300.17, 300.121, 300.130, 300.300, 300.340, and 300.346.

Fiscal Years 1992-1994 State Plan Under Part B of the Individuals With Disabilities Education Act.

C. FINDINGS

1. At all times relevant to the complaint, the district was receiving funds under the Act pursuant to an approved application for funding.

2. The funds were paid to the district, in part, based on the assurances contained within the application.

3. One of the assurances made by the district is that, in accordance with the Act, it will provide a free appropriate public education, including special education and related services, to each eligible student with disabilities within its jurisdiction to meet the unique needs of that child.

4. Specific special education instructional and related services for a child are to be identified on a child's IEP and must be provided.

5. Related services are identified on a child's IEP and must be provided if they are required to assist a child with a disability to benefit from special education. Related services may include transportation and developmental, corrective or other supported services.

6. M.J. transferred from Cherry Creek Schools to Englewood Schools having an IEP dated 12/7/92.

7. An IEP for diagnostic direct placement was developed by Englewood Schools for M.J. on 8/20/93. That IEP indicated that M.J. "chokes in feeding".

8. The IEP was developed further on 8/30/93. One objective was to "Re-evaluate health action plan, feeding...". A "Health Action Plan" is cross referenced under Special Provisions of the Plan.

9. The Health Care Plan dated 8/30/93 states the following:

   Medical Health Concerns: "swallow reflex/Choking with feeding."

   "IV. Choking - A constant concern with M. Her scoliosis has twisted her body so that her sternum is located on her right side. "

   "VI. Feeding - If for some reason M. can't be fed, just notify her parents in her back and forth book."

10. The IEP developed on 8/20 and 8//30/93 and referenced health care plan do not specifically list feeding as a related service, however there appears to be some inference that feeding would be provided if safe. It is clear that the professionals within the district reasonably recommended further evaluation regarding the issue of safe feeding.

11. Further evaluation was done and the Assistive, Augmentative, Alternative Communication report dated 9/17/93 states:

> "Our concerns centered around the amount of aspiration M. may be experiencing with her current method of feeding (tipped back head and gravity swallow). It did not appear the M. could be fed by mouth adequately with the good positioning of chin tuck and oral control facilitation that is essential for safe, aspiration free feeding. We recommend that M. receive a complete evaluation at The Children's Hospital Swallowing Disorders Clinic where she would receive a feeding assessment..."

12. A letter dated 9/17/93 regarding the above referenced report, from the Director of Special Education to the parents, states:

> "...I had directed school personnel, until further notice, to discontinue feeding M. This decision was based solely on your daughter's safety. Personnel trained in the area of feeding have indicated extreme concern related to the current procedures being implemented. M. continues to be eligible to attend school and in no way are we denying her that right. We would ask that a family member feed her at school for a period of time until the district can determine an appropriate and safe feeding procedure for M."

13. According to the Director and Mrs. J., the parents stopped sending M. to school after receipt of this letter. Since the district was reasonably requesting further evaluation of safe feeding and feeding services were not yet identified as a related service on the IEP, the district's proposed alternative was reasonable as a very short term measure.

14. Parents were provided written notification of a staffing to be held 9/30/93 for the purpose of reviewing progress, making recommendations for the coming school year and developing annual measurable goals and objectives. This was later changed at the request of the parent to 9/27/93.

15. The Director of Special Education indicated that "An attempt to review M.'s placement and IEP was made at this meeting. However, it was not possible to complete the meeting in a traditional manner due to the intensity of the parent's wishes to discuss only the feeding issue."

16. Following the meeting, the Director of Special Education sent a letter to the parents outlining the district's position. It states:

> "The school district is recommending: An evaluation of M. at the Swallowing Disorder Evaluation Clinic at Children's Hospital at district expense. Based on recommendations of that evaluation, if deemed appropriate, school personnel would be trained by Children's staff in appropriate feeding techniques for M. Until such testing and training, if needed, were accomplished, the district proposes that M. be fed at school by a family member or the district will transport M. home for lunch and then transport her back to school for the afternoon session."

17. According to interviews with Mrs. J. and the Director, the parents did not accept either of the above options. A mediation was then held on 10/4/93 to assist with resolution. The mediation agreement states:

"L. and R. will ask Dr. Matthew's to conduct an observation evaluation of M. being fed by L. and R. They will ask him to respond in writing to the school district and the parents to the questions of: 1. is this a safe way to feed M. and 2. is further assessment necessary? Once this is obtained each person will decide what to do next."

18. An evaluation of M's feeding was conducted by Dennis J. Matthews, M.D., Medical Director of the Rehabilitation Center at Children's Hospital. Dr. Matthews reported the following:

> "Although the technique that the family used is not textbook technique, it has gradually been worked out by the family and they seem to be able to meet M.'s baseline needs for fluids and calories. I think that, given the clinical history and lack of recurrent pneumonia, that this technique is safe. I do not feel that there would be anything added to the evaluation by a formal video-fluoroscopy study. It would be my recommendation that the family teach the school district their technique."

III. CONCLUSIONS

A. The district did not violate the Act by failing to provide feeding services to M.J. as called for on her individual educational program ("IEP"). "Feeding services" were not listed as a related service on the IEP developed on 8/20 and 8/30/93. Further, based on certain assessments being done in order to develop the IEP, a recommendation was made to further evaluate M. in regard to her feeding needs. The district was reasonable in attempting to follow through with this evaluation and in proposing certain alternatives until it could be accomplished. The parents chose not to participate in either proposal but instead kept M. at home.

IV. REMEDIAL ACTIONS

None.

V. RECOMMENDATIONS

It is recommended that the district hold an IEP meeting as soon as possible to develop an IEP for M.J., a part of which would be to consider weather or not to add "feeding" to the IEP as a related service. The recommendations of Dr. Matthews must be considered as part of that meeting.

It is recommended that the parents resume sending M.J. to school immediately.

Dated this 11th day of October, 1993

Carol Amon, Federal Complaints Coordinator

Case Number: 93.511

Status: Complaint Findings

Key Topics: Procedural Safeguards
Free Appropriate Public Education (FAPE)
Individual Educational Plan (IEP)

Issues:

- Whether or not the district failed to develop an IEP in a timely manner.
- Whether or not the district failed to provide notice to parents of IEP meetings and failed to schedule the meeting at a mutually agreed on time and place.

Decision:

- The district did not violate the Act pertaining to providing a current IEP.
- The district did violate the Act by failing to include all required items in the parent notice.
- The district also violated the Act by amending IEPs at the request of the parent, without reconvening the IEP committee.

Discussion:

- Parent notification forms must include a statement indicating the parents' right to request that the meeting be rescheduled if the time and place set forth is not mutually convenient.
- The district often changed the IEP at parental request which resulted in IEPs not being finalized for months and confusion as to what was an IEP meeting.

FEDERAL COMPLAINT NUMBER 93:511

FINDINGS AND RECOMMENDATIONS

I. PRELIMINARY MATTERS

A. The complaint was received by the Federal Complaints Coordinator, Colorado Department of Education (CDE), on September 27, 1993.

B. The complaint was filed by Mr. R.A. on behalf of his son, C.A., against Widefield School District, Mr. Gene Cosby, Superintendent and Mr. Jerry Hahn, Special Education Supervisor (the district).

C. The process for receipt, investigation and resolution of the complaint is established pursuant to the authority of the Individuals With Disabilities Education Act 20 U.S.C. 1401 et. seq., (the Act), and its implementing regulations concerning state level complaint procedures, 34 C.F.R. 300.660-300.662, and Colorado State Board of Education Policy No. 1280.0.

D. The complaint was brought against the district as a recipient of federal funds under the Act. It is undisputed that the district is a program participant and receives federal funds for the purpose of providing a free appropriate public education to eligible students with disabilities under the Act.

E. C.A. is a student with disabilities eligible for services from the district under the Act.

F. The complaint was accepted for investigation based upon a determination that CDE had jurisdiction over some of the allegations contained in the complaint pertaining to violations of federal law and rules in a federally funded program administered by CDE.

G. The timeline within which to investigate and resolve this matter expires on November 29, 1993.

H. The investigation of the complaint included a review of the documents submitted by the parties, interviews with persons named in those documents or who had information relevant to the complaint and consideration of relevant case law and federal agency opinion letters.

I. ISSUE

A. STATEMENT OF THE ISSUE:

Whether or not the district has violated the provisions of the Act by

(1) failing to provide C.A. a free appropriate public education (FAPE) by not developing a current IEP on or before May 27, 1993 and

(2) failing to provide Mr. A. procedural safeguards by
  (a) failing to notify him of IEP meetings early enough to ensure participation,
  (b) failing to schedule the meeting at a mutually agreed on time and place, and
  (c) failing to provide notice indicating the purpose, time and location of the meeting and who will be in attendance.

B. RELEVANT STATUTORY AND REGULATORY CITATIONS

20 U.S.C. 1401 (16), (17), (18), and (20) and 1414.

34 C.F.R. 300.2, 300.8, 300.11, 300.14, 300.16, 300.17, 300.121, 300.130, 300.180, 300.235, 300.300, 300.340, 300.342, 300.343, 300.345, 300.346, 300.504 and 300.505.

Fiscal Years 1992-1994 State Plan Under Part B of the Individuals With Disabilities Education Act, Section V.E.

C. FINDINGS

1. At all times relevant to the complaint, the district was receiving funds under the Act pursuant to an approved application for funding.

2. The funds were paid to the district, in part, based on the assurances contained within the application.

3. One of the assurances made by the district is that, in accordance with the Act, it will provide a free appropriate public education, including special education and related services, to each eligible student with disabilities within its jurisdiction to meet the unique needs of that child. In carrying out its responsibilities, the district identified C.A. as an eligible student with disabilities and, consequently, with the participation of his parents, developed an IEP for him.

4. IEPs must be developed and reviewed at least annually, by a committee which includes the parent(s), and decisions must be reached through group discussion and consensus. IEPs may not be amended without the reconvening of the IEP committee.

5. IEPs must contain the following: statements of present levels of functioning, achievement and/or performance and needs, annual goals, short term objectives with objective criteria and evaluation procedures and schedules, specific special education and related services to be provided, the extent of participation in regular education, dates for initiation of services an d anticipated duration, recommended placement in the least restrictive environment (LRE).

6. There is no requirement that parent(s) indicate approval of an IEP by signature. Rather, the IEP resulting from group consensus at a meeting is considered valid. Should a parent not agree with the decisions of the IEP committee, he or she may exercise the right to appeal.

7. IEPs were developed for C.A. dated as follows and contained the following information:

10/90	9/91	5/92	5/92	10/92	4/93	5/93	8/93	9/93	
X					X				statements of present levels of functioning, achievement and/or performance and needs,
X		X	X			X		X	annual goals,
X		X	X			X		X	short term objectives with objective criteria and evaluation procedures and schedules,
X	X				X				specific special education and related services to be provided,
									the extent of participation in regular education,
X	X				X	X			dates for initiation of services and anticipated duration,
X	X				X				recommended placement in the least restrictive environment.

8. IEPs appear to be completed in parts with goals and short term objectives being revised by the case manager/teacher and parent after the IEP meeting. These are typed into a format different from the district's standard IEP form.

   District personnel acknowledge the above and indicate that this is at the request of Mr. A., stating that he does not accept the goals and objectives as written at the meetings. They stated that it often takes several months to reach agreement.

   Mr. A. acknowledges that he only accepts typed IEPs, but that he is frustrated with the district's never developing a complete IEP containing all that is required by regulation.

9. A complete IEP for C.A. was developed on the combined dates of 4/15/93 and 5/93 which is on or before 5/27/93. Goals and objectives were apparently amended on 9/21/93 by the parent and case manager.

10. School records contain undated notifications of staffings (IEP meetings) to occur on 10/25/90, 9/9/91, 10/15/92, 8/31/93. They also state, "If you have any questions...about the time that has been scheduled for you, please call your school counselor." They do indicate purpose, time and location of the meetings, but not who will be in attendance.

11. School records contain one notice dated 4/5/93 for a staffing to occur on 4/15/93.

12. District personnel state that parental notice was provided to Mr. A. on the five dates (above) as these were the official IEP meeting dates. IEPs with other dates on them were amended IEPs made at the request of the parent at a later date.

13. The district's parent notification form does not include: (a) a space for the date, (b) a statement indicating the parents' right to request that the meeting be rescheduled if the time and place set forth is not mutually convenient, nor (c) a space to indicate who will be in attendance.

14. A report of the CDE onsite evaluation of the district in 2/93, states, Written notification to the parents of the IEP meeting must include a statement which indicates that parents have the right to reschedule the meeting at a mutually agreed upon time and place if such can be found.

III. CONCLUSIONS

The district did not violate the Act in regard to providing C.A. with a free appropriate public education by failing to provide a current IEP by May 27, 1993.

The district did violate the Act by failing to provide Mr. A. procedural safeguards, specifically by not including all required items in the parent notice.

The district also violated the Act by amending IEPs at the request of the parent, without reconvening the IEP committee.

IV. REMEDIAL ACTIONS

On or before December 15, 1993, the district must have redesigned its parent notification form to include all necessary information as listed in Federal regulations and the State Plan and utilize that form.

The district must immediately cease its practice of amending IEPs at parent request without reconvening an IEP committee.

On or before January 4, 1994, the district must forward to this office a copy of the new parent notification form.

Within 15 days from the date of the triennial review IEP meeting which the district must conduct for C.A., the district must forward to this office: a copy of the IEP for C.A. which was developed by the committee.

Dated this 24th day of November, 1993

Carol Amon

Carol Amon, Federal Complaints Coordinator

Case Number: 93.512

Status: Complaint Findings

Key Topics: Individual Educational Plan (IEP)

Issues:

- Whether or not the district failed to develop a current IEP and provide special education services.

Decision:

- The district did violate the Act by failing to reconvene the IEP committee in the fall and to provide services.

Discussion:

- Informality in dealings between parent and district resulted in failure to appropriately develop and IEP.

FEDERAL COMPLAINT NUMBER 93:512

FINDINGS AND RECOMMENDATIONS

I. PRELIMINARY MATTERS

A. The complaint was received by the Federal Complaints Coordinator, Colorado Department of Education (CDE), on September 29, 1993.

B. The complaint was filed by Ms. R.M. on behalf of her son, Z.M., against Thompson School District, Dr. Donald Saul, Superintendent and Mr. Douglas Householder, Special Education Director (the district).

C. The process for receipt, investigation and resolution of the complaint is established pursuant to the authority of the Individuals With Disabilities Education Act 20 U.S.C. 1401 et. seq., (the Act), and its implementing regulations concerning state level complaint procedures, 34 C.F.R. 300.660-300.662, and Colorado State Board of Education Policy No. 1280.0.

D. The complaint was brought against the district as a recipient of federal funds under the Act. It is undisputed that the district is a program participant and receives federal funds for the purpose of providing a free appropriate public education to eligible students with disabilities under the Act.

E. Z.M. is a student with disabilities eligible for services from the district under the Act.

F. The complaint was accepted for investigation based upon a determination that CDE had jurisdiction over the allegations contained in the complaint pertaining to violations of federal law and rules in a federally funded program administered by CDE.

G. The timeline within which to investigate and resolve this matter expires on December 3, 1993.

H. The investigation of the complaint included a review of the documents submitted by the parties, interviews with persons named in those documents or who had information relevant to the complaint and consideration of relevant case law and federal agency opinion letters.

I. ISSUE

A. STATEMENT OF THE ISSUE:

Whether or not the district has violated the provisions of the Act by failing to develop a current IEP and provide special education services to Z.M.

B. RELEVANT STATUTORY AND REGULATORY CITATIONS

20 U.S.C. 1401 (16), (17), (18), and (20) and 1414.

34 C.F.R. 300.2, 300.8, 300.11, 300.14, 300.16, 300.17, 300.121, 300.130, 300.300, 300.340, 300.343, and 300.346.

Fiscal Years 1992-1994 State Plan Under Part B of the Individuals With Disabilities Education Act, Section V.E.

C. FINDINGS

1. At all times relevant to the complaint, the district was receiving funds under the Act pursuant to an approved application for funding.
2. The funds were paid to the district, in part, based on the assurances contained within the application.
3. One of the assurances made by the district is that, in accordance with the Act, it will provide a free appropriate public education, including special education and related services, to each eligible student with disabilities within its jurisdiction to meet the unique needs of that child.
4. Specific special education services to be provided to the child are to be identified on a child's IEP and must be provided.
5. A special education referral for Z.M. was made in 1987, followed by assessment and the convening of a staffing committee on 4-14-87. Z.M. was determined to be ineligible for special education.
6. A second referral for special education for Z.M. was made in 1989, followed by assessment and the convening of a staffing committee on 5-22-89. The staffing committee concluded that "Z. will have further testing by the school audiologist in the near future...The staffing team will meet again in September, 1989 to complete staffing once results of this testing are known."
7. Mrs. M. withdrew Z.M. from the school district beginning with the 1989-90 school year. The continuation and completion of the staffing initiated on 5-22-89, therefore, did not occur.
8. Z.M. was not identified by the district as an eligible student for special education and related services during the 1986/1987 through 1991/1992 school years.
9. Mrs. M. contacted the school district in February of 1993, requesting special education referral through the child find process, as Z.M. was participating in home schooling.
10. An IEP meeting was held on 3-24-93. Z.M. was found to be eligible for special education due to a Perceptual-Communicative Disorder (PCD). The IEP committee recommended placement in "home schooling with homebound services through remaining school year". The committee indicated that the beginning date was 3/24/93 and the anticipated ending date was 3/94. Although this appears to be in conflict, this was clarified by the committee by stating, "The team will need to reconvene in the fall to plan for Z. for next school year".

11. Written communication from the Special Education Director indicates that he explored acceptance of Z.M. at a new private school for nontraditional students. Z.M. was initially not accepted at that school but was being considered for a second round of acceptances, but Ms. M. did not want to enroll Z.M. at that school, even if accepted.

12. The Special Education Director subsequently arranged for a homebound tutor who implemented services on 10/20/93.

13. Written communication dated 11/5/93 indicates the District is currently providing special services for Z. in a diagnostic placement, while evaluating seven alternative programming options.

14. The Special Education Director states that he has been working positively with Ms. M. to plan for Z.M. and locate appropriate services, however, the district provided no documentation that it reconvened the IEP team in the fall to plan for Z. M. for the school year.

15. The Special Education Director states that the parent has requested that an IEP meeting not be held, and therefore, the district provided no documentation of an interim IEP reflecting the diagnostic placement for Z.M.

16. Although the district may be working positively with Ms. M. which includes not holding an IEP meeting at her request, the district is required by regulation to develop a written IEP for Z.M. and to provide services commensurate with the recommendations of the IEP committee.

III. CONCLUSIONS

The district did violate the Act by failing to reconvene the IEP committee in the fall of 1993 to plan for Z.M. for the 1993-94 school year and by failing to provide Z.M. with a free appropriate public education in accordance with an IEP.

IV. REMEDIAL ACTIONS

On or before December 20, 1993, the district must reconvene the IEP committee to plan for Z.M. for the remainder of the school year. The team must also consider weather or not Z.M. should receive compensatory services for services not provided from 8/25/93 to 12/20/93, in accordance with an IEP, and, if so, detemine the specific special education and/or related service(s) to be provided as well as the duration of the service(s).

On or before January 7, 1994, the district must provide this office with a copy of the IEP along with a description of the services being provided to Z.M. beginning 1/3/94.

Dated this 24th day of November, 1993

Carol Amon

Carol Amon, Federal Complaints Coordinator

Case Number: 93.513

Status: Complaint Findings

Key Topics: Related Services (Transportation)

Issues:

- Whether or not the district failed to proved transportation services to a student residing outside the district, but accepted into the district on a tuition waiver.

Decision:

- The district did violate the Act and must provide transportation.

Discussion:

- By the district's own admission, the student had been determined to be eligible for special education services, and transportation was indicated as a related service on the IEP.

FEDERAL COMPLAINT NUMBER 93:513

FINDINGS AND RECOMMENDATIONS

I. PRELIMINARY MATTERS

A. The complaint was received by the Federal Complaints Coordinator, Colorado Department of Education (CDE), on October 25, 1993.

B. The complaint was filed by the Legal Center representing P.W. on behalf of her foster daughter, M.E. against the El Paso #11 School District, Dr. Kenneth S. Burnley, Superintendent (the district).

C. The process for receipt, investigation and resolution of the complaint is established pursuant to the authority of the Individuals With Disabilities Education Act 20 U.S.C. 1401 et. seq., (the Act), and its implementing regulations concerning state level complaint procedures, 34 C.F.R. 300.660-300.662, and Colorado State Board of Education Policy No. 1280.0.

D. The complaint was brought against the district as a recipient of federal funds under the Act. It is undisputed that the district is a program participant and receives federal funds for the purpose of providing a free appropriate public education to eligible students with disabilities under the Act.

E. M.E. is a student with disabilities eligible for services from the district under the Act according to an IEP dated 10/15/92 to which an addendum was attached on 2/18/93.

F. The complaint was accepted for investigation based upon a determination that CDE had jurisdiction over some of the allegations contained in the complaint pertaining to violations of federal law and rules in a federally funded program administered by CDE.

G. The timeline within which to investigate and resolve this matter expires on December 27, 1993.

H. The investigation of the complaint included a review of the documents submitted by the parties, interviews with persons named in those documents or who had information relevant to the complaint and consideration of relevant case law and federal agency opinion letters.

I. ISSUE

A. STATEMENT OF THE ISSUE:

Whether or not the district has violated the provisions of the Act by allegedly failing to provide transportation services to M.E..

B. RELEVANT STATUTORY AND REGULATORY CITATIONS

20 U.S.C. 1401 (16), (17), (18), and (20) and 1414.

34 C.F.R. 300.2, 300.8, 300.11, 300.14, 300.16, 300.17, 300.121, 300.130, 300.300, 300.340, 300.343, 300.346,

Fiscal Years 1992-1994 State Plan Under Part B of the Individuals With Disabilities Education Act, Section V.E.

C. FINDINGS

1. At all times relevant to the complaint, the district was receiving funds under the Act pursuant to an approved application for funding.

2. The funds were paid to the district, in part, based on the assurances contained within the application.

3. One of the assurances made by the district is that, in accordance with the Act, it will provide a free appropriate public education, including special education and related services, to each eligible student with disabilities within its jurisdiction to meet the unique needs of that child. In carrying out its responsibilities, the district identified M.E. as an eligible student with disabilities and, consequently, with the participation of her foster parent, P.W., developed an IEP for her.

4. The IEP dated 10/15/92 states "Transportation needs: to and from school - D11 bus."

5. An addendum to the above IEP dated 2/18/93 states, "Due to a change of address outside of District 11, M.E. will be transported to school for the remainder of the 1992-1993 school year by her foster mother, P.W....(After dismissal from school) She will ride a District 11 bus to Stratton Elementary Daycare Center. A staffing will occur in (blank) to review M.E.'s needs."

6. M.E. lives with P.W. who currently resides outside District 11, but was allowed to attend a District 11 school by being granted a tuition waiver for the 1992-93 school year. This was withdrawn for the 1993-94 school year and P.W. subsequently filed a complaint with the Office for Civil Rights, U. S. Department of Education on July 22, 1993. That agency is currently investigating this matter.

7. Mr. Ronald E. Hage, Director of Special Education for District 11, in a letter dated 11/23/93, stated that, "Since the OCR investigation has not yet concluded and since M.E. is attending school in our District, we will agree to provide all related services required in M.E.'s IEP, including transportation. When the OCR investigation is concluded, we will review our responsibility for the provisions of special educational and related services to M.E.."

8. Until the district has completed a new IEP for M.E., the IEP dated 10/19/92 and amended on 2/18/93 is the current IEP. The district has provided no documentation of a new or revised IEP.

9. This office must draw conclusions based on the information provided. By the district's own admission, M.E. has been determined to be eligible for special education and related services, and transportation from school to the day care center is indicated as a related service on the IEP. Our inquiry does not need to go beyond this.

III. CONCLUSIONS

The district did violate the Act by failing to provide transportation as a related service.

IV. REMEDIAL ACTIONS

The district must immediately provide transportation from school to the day care center as indicated on the current IEP and must continue to do so until such time as a new IEP is developed.

Dated this 27th day of December, 1993

Carol C Amon

Carol Amon, Federal Complaints Coordinator

Case Number: 93.516

Status: Complaint Findings

Key Topics: Procedural Safeguards
Free Appropriate Public Education (FAPE)
Student Evaluation

Issues:

- Whether or not the district failed to inform parents of their right to a special education referral and subsequent evaluation.
- Whether or not the district failed to evaluate a student as a result of a special education referral and provide subsequent appropriate education.

Decision:

- The district did violate the Act by denying a special education referral and subsequent evaluation and services. The student may be entitled to compensatory services.

Discussion:

- The district may not unilaterally determine that problems are due to behavior and not learning, and therefore deny a special education referral.

FEDERAL COMPLAINT NUMBER 93:516

FINDINGS AND RECOMMENDATIONS

I. PRELIMINARY MATTERS

A. The complaint was received by the Federal Complaints Coordinator, Colorado Department of Education (CDE), on December 7, 1993.

B. The complaint was filed by Mr. and Mrs. A.R. on behalf of their daughter, V.R., against Denver Public Schools, Dr. Evie G. Dennis, Superintendent and Ms. Pat Hall, Special Education Director (the district).

C. The process for receipt, investigation and resolution of the complaint is established pursuant to the authority of the Individuals With Disabilities Education Act 20 U.S.C. 1401 et. seq., (the Act), and its implementing regulations concerning state level complaint procedures, 34 C.F.R. 300.660-300.662, and Colorado State Board of Education Policy No. 1280.0.

D. The complaint was brought against the district as a recipient of federal funds under the Act. It is undisputed that the district is a program participant and receives federal funds for the purpose of providing a free appropriate public education to eligible students with disabilities under the Act.

E. The complaint was accepted for investigation based upon a determination that CDE had jurisdiction over the allegations contained in the complaint pertaining to violations of federal law and rules in a federally funded program administered by CDE.

F. The timeline within which to investigate and resolve this matter expires on February 4, 1994.

H. The investigation of the complaint included a review of the documents submitted by the parties, interviews with persons named in those documents or who had information relevant to the complaint and consideration of relevant case law and federal agency opinion letters.

I. ISSUE

A. STATEMENT OF THE ISSUE:

Whether or not the District has violated the provisions of the Act by:
(1) failing to provide V.R. a free appropriate public education (FAPE) by:
- not evaluating her as a result of a special education referral and
- not providing a subsequent appropriate education, and by

(2) failing to provide Mr. and Mrs. R. procedural safeguards by
- not informing them of their parental right to a special education referral and subsequent evaluation.

B. RELEVANT STATUTORY AND REGULATORY CITATIONS

20 U.S.C. 1401 (16), (17), (18), and (20) and 1414.

34 C.F.R. 300.2, 300.8, 300.11, 300.14, 300.16, 300.17, 300.121, 300.128, 300.130, 300.131, 300.133, 300.180, 300.220, 300.235, 300.237, 300.300, 300.340, 300.343, and 300.530, 300.531, 300.532, 300.533, and 300.562.

Fiscal Years 1992-1994 State Plan Under Part B of the Individuals With Disabilities Education Act

C. FINDINGS

1. At all times relevant to the complaint, the district was receiving funds under the Act pursuant to an approved application for funding.

2. The funds were paid to the district, in part, based on the assurances contained within the application.

3. One of the assurances made by the district is that, in accordance with the Act, it will identify, locate, and evaluate all children with disabilities who are in need of special education and related services.

4. Another assurance made by the district is that, in accordance with the Act, it will provide a free appropriate public education, including special education and related services, to each eligible student with disabilities within its jurisdiction to meet the unique needs of that child.

5. Should a parent request evaluation for special education, that evaluation must be made by a multidisciplinary team or group of persons, including at least one teacher or other specialist with knowledge in the area of the suspected disability and no single procedure may be used as the sole criterion for determining an appropriate educational program for a child.

6. Every school year each student attending a Denver Public School receives a copy of a pamphlet entitled "Information for Parents" to take home. Under the heading, "Education of handicapped students", it states, "The school district is responsible for working with parents and staff members and parents to identify any students who may not be able to profit from the regular educational program because of handicapping conditions. Any questions should be directed to the principal of the school the student attends or to the Department of Special Education."

7. Documentation submitted by the District indicates that V.R. attended Denver Public Schools since 8/86 in schools with teachers and grades as follows:

School Year	Grade	School	Teacher	Average Grades
86-87	K	Smedley		
87-88	1	Smedley		S
88-89	2	Smedley		S
89-90	3	Kaiser	E. Marques	B-
90-91	4	Kaiser	Wendy Pierce Connor	C+
91-92	5	Kaiser	Patricia Sieders	C
92-93	6	Horace Mann		C-
93-94	7	Horace Mann		C-

8. A review of V.R.'s grades indicates that they dropped each year compared to the previous year.

9. Mrs. R. states that she has attempted to obtain educational assessment from the Denver Public Schools for the past seven years to determine V.R.'s special needs, but that these attempts were unsuccessful. She states that she specifically asked Dr. Guevara, principal at Horace Mann, for special education assessment in the fall of 1992. She stated that Dr. Guevara indicated that school personnel needed to observe V.R. first, and would decide if assessment should be completed. Mrs. R. states that Dr. Guevara contacted her later, saying they would not provide assessment for special education, as V.R.'s problems were related to behavior, not learning. Mrs. R. states that she continued to make these requests through April, 1993, at which time they were again denied.

10. Kathleen Van Zant, special educator at Smedley School, states that, to her knowledge, V.R. was never referred for special education evaluation.

11. Ann Wanker, special education teacher and staffing chairperson for Kaiser School, states that V.R.'s parents did not request a special education evaluation, to her knowledge.

12. E. Marques, V.R.'s third grade teacher, states that she found it necessary to conference with V.R. and her mother often about V.R.'s behavior, but that V.R. was a capable student.

13. Wendy Pierce Connor, V.R.'s fourth grade teacher, states that she had numerous conversations with Mrs. R. about V.R.'s attitude and behavior, but that her behavior incidents were not excessive enough or severe enough to warrant a special education referral. She also states that V.R.'s academic needs were being addressed in the regular classroom and IAP (Chapter I) program. She does not recall ever discussing Special Education or the referral process with Mr. or Mrs. R by their instigation or hers.

14. Patricia Sieders, V.R.'s fifth grade teacher, states that V.R. was a very capable student, but that she did often earn unsatisfactory grades because she chose not to pay attention or to complete the work. She recalls being questioned by Mrs. R. as to whether she thought V.R. was in need of special assistance, but that Mrs. R. did not ever request special education assistance for V.R. nor did she request any form of testing to be done to determine if V.R. was in need of any further assistance.

15. Linda Mitts, special educator at Horace Mann Middle School, states that she and Martha Guevara, the principal, had a conference with Mrs. R. during which time Mrs. R. expressed her concern about V.R. coming to Horace Mann. Linda Mitts told Mrs. R. that they would keep an eye on her and see if they could see any learning problems. In the spring, Linda Mitts checked with Linda Younker, the 6th grade special education teacher, who stated that in her opinion, V.R. was not exhibiting learning problems, but rather behavior problems.

16. Ms. Linda Carbajal, a reading specialist at Keystone Learning Center and a neighbor of Mrs. R., stated in a telephone conversation on 1/10/94, the following:

> She conversed with Mrs. R. over a two year period about the need for testing for V.R. When she first spoke with Mrs. R. about her concerns, she asked Mrs. R. why she didn't have V.R. tested at school. Mrs. R. stated that she has requested that since the first grade but that they have always refused, stating that it was just a behavior problem.

In the fall of 1992 Ms. Carbajal suggested to Mrs. R. that she ask again. In the spring of 1993 Ms. Carbajal asked Mrs. R. if V.R. had been evaluated. Mrs. R. responded that she had asked, but they refused. Mrs. Carbajal suggested that she ask again. Ms. Carbajal stated that Mrs. R. responded by saying she did ask again, but was told that nothing is wrong...just behavior. Ms. Carbajal then suggested that private testing be done through Children's Hospital.

17. Mrs. R. initiated a request for assistance on 9/1/93, indicating that she had V.R. tested over the summer at Children's Hospital at her expense. Mrs. R. signed a consent for individual evaluation form on 9/23/93.

18. Results of testing completed at Children's Hospital include the following:

(a) V.R.'s Verbal and Performance I.Q. scores (mentally deficient and low average) were significantly discrepant with her Full Scale I.Q. falling within the borderline range.

(b) Diagnosis included Attention Deficit Hyperactivity Disorder (ADHD), Borderline Intellectual Functioning and Developmental Language Disorder.

(c) Inconsistent processing of auditory information and directions.

(d) Variable memory skills.

(e) Moderate to significant delays in visual perception.

(f) Significantly impaired receptive language skills which were overall commensurate with cognitive testing.

(g) Variable academic skills which are impacted by inconsistent memory and attention in addition to overall language deficits.

(h) Significantly delayed general knowledge.

19. A placement staffing and IEP meeting was held on 10/14/93 but was not completed apparently due to the need for auditory processing testing results as well as an OT/PT evaluation. Auditory processing testing results were given to the team on 10/21/93. OT/PT evaluation was completed on 12/3/93. The IEP was then completed on 12/15/93. Evaluation was thus completed 63 school days after the special education referral and 48 days after signed parent permission to assess. The IEP was completed 71 school days after the special education referral and 56 days after the signed permission to assess.

20. Evaluation results from Denver Public Schools indicate the following:

(a) student lacks productivity due to short attention span (next to none) and attention seeking behavior

(b) mother has noticed problems since kindergarten, especially at the 4th and 5th grade levels

(c) serious deficits in adaptive behavior...scored low on areas of self-direction, prevocational activities, numbers & time, and independent functioning.

(d) motor skills within a typical range for her age

21. The IEP for V.R. developed on 10-14-93 and completed on 12-15-93 indicates the following:

    (a) V.R. has a primary handicapping condition of Physical Disability and a secondary handicapping condition of speech/language.

    (b) Annual goals include the improvement of reading skills, vocational skills, figurative language, written language skills and math skills as well as increasing critical thinking skills and understanding of social clues.

    (c) V.R. is to receive the following direct special education services: 180 minutes from an itinerant teacher of physical disabilities, 135 minutes from a resource teacher of physical disabilities and 225 minutes from a speech/language resource specialist which total 9 hours of special education per week, beginning 12/16/93.

22. While Mrs. R. believes she has asked for special education evaluation since V.R. was in the first grade, the District does not recall any requests for special education evaluation prior to the fall of 1993 and no documentation exists to support such a request. The District does admit that V.R. did often earn unsatisfactory grades in the fifth grade because "she chose not to pay attention or to complete the work" and that Mrs. R. asked the teacher if she thought V.R. was in need of special assistance. The District also admits that Mrs. R. was very concerned about V.R. when entering the 6th grade but that the 6th grade special education teacher's opinion was that V.R. was not exhibiting learning problems, but rather behavior problems. A neighbor of Mrs. R., who served as an advocate due to her experience as a reading teacher, has firmly stated that Mrs. R. relayed to her having requested assessment in the fall of 1992 and again in the spring of 1993 and that both requests were denied. Mrs. R. did then obtain evaluation at her own expense in the summer of 1993.

III. CONCLUSIONS

1. It is the conclusion of this office that the District did violate the Act by not providing evaluation as a result of a special education referral and a subsequent appropriate education in the fall of 1992. Although there is no documentation of a written special education referral, it is evident that Mrs. R. was asking for some evaluation and that the District responded by unilaterally determining that problems were due to behavior, not learning; and therefore a special education referral was not warranted. One year later, after Mrs. R. obtained evaluation privately, the district did determine that V.R. had learning problems which were not just the result of behavior.

2. Since Mrs. R., in the fall of 1992, did exhaust one of the two options given to her in the parent information pamphlet by directing questions to the principal, and the principal unilaterally determined no need for a special education referral, the District did deny Mr. and Mrs. R. procedural safeguards by not informing them of their parental right to a special education referral and subsequent evaluation even if the principal disagreed with the referral.

3. The District violated the Act by not providing evaluation and determination of disability within 45 days from the date of the written special education referral.

4. V.R. has received a full special education evaluation and is currently receiving free appropriate public education as determined by the IEP committee of which Mrs. R. was a participant.

5. Although V.R. is currently receiveing appropriate services, she was denied those services during the 1992-93 school year and the first 14 weeks of the 1993-94 school year. Assuming services would have been similar to those currently identified as appropriate, V.R. was denied approximately 450 hours of special education (9 hours X 36+14 weeks = 9 X 50 = 450 hrs). It is not always appropriate to calculate denied services, but appears to be in this case; and V.R. may be entitled to additional special education. Since the IEP committee determined an appropriate education for the remainder of the school year, however, adding additional special education to her current program would not necessarily be beneficial.

IV. REMEDIAL ACTIONS

On or before the end of the current school year, the district must reconvene the IEP committee to determine weather or not V.R. would benefit from additional special education services (not to be confused with extended school year services) during the summer of 1994, to compensate for those services denied, and if so, to develop an IEP for the summer and provide those services.

On or before June 15, 1994, the district must provide this office with a copy of the results of the above meeting.

Dated this 7th day of February, 1994

Carol Amon, Federal Complaints Coordinator